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Chairman: Mr. Suheimat (Vice-Chairman) .... (Jordan)
later: Mr. Politi (Chairman).. (Italy)

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In the absence of the Chairman, Mr. Suheimat (Jordan), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Kerma** (Algeria) said that he welcomed the progress made by the International Law Commission on the issue of State responsibility, which was very important for harmonious international relations and constituted one of the fundamental areas of contemporary international law. The codification of State responsibility was a crucial alternative to the use of force as a means of settling disputes between States, and represented the best way of guaranteeing the maintenance of international peace and security. His delegation felt, moreover, that the strengthening of the system of State responsibility served to consolidate peace.

2. The issue of countermeasures, which was at the heart of the draft articles under consideration, was a delicate and controversial subject. In that connection, his delegation had already expressed some reluctance to accept their inclusion in the draft articles because it feared the introduction, into relations between States, of a regime equivalent to sanctions regimes that would enable some States, usually the most powerful ones, to restore a situation by themselves on the ground that had been breached by a wrongful act. That idea, which had originated from the practice of certain States, especially the most powerful ones, could not aspire to universality and, consequently, to codification as a rule of international law unless it was subject to the most extreme precautions.

3. Thus, an exercise that would lead to the codification of a legal regime of countermeasures that did not take into account the de facto inequality between States, even if such an exercise took place with a view to the progressive development of international law, would only give legal sanction to what was, to say the least, a debatable practice. It might indeed be wondered whether such a codification exercise would tend to legitimize the use of countermeasures as tools for individual coercive actions by certain Powers. In fact, while Algeria had never disputed the existence, according to international custom, of a rule of international law authorizing a State to breach a legal obligation towards a State that had committed a wrongful act against it, Algeria was concerned about the conditions for the application of such countermeasures.

4. In that connection, the Algerian delegation welcomed the content of new draft article 51, entitled "Obligations not subject to countermeasures", which enumerated a number of obligations from which countermeasures could not involve any derogation, particularly the obligation to refrain from the use of force, obligations for the protection of fundamental human rights and humanitarian obligations prohibiting any form of reprisals, as well as obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents. Thus, all countermeasures that breached those obligations were prohibited under that draft article. However, the Algerian delegation felt that the draft article should also expressly prohibit all countermeasures that could undermine the sovereignty, independence or territorial integrity of States. Moreover, it was pleased to note that the taking of countermeasures was subject to conditions and instructions laid down in some provisions of the draft articles concerning, respectively, resort to countermeasures (draft articles 53 and 55), the principle of proportionality and dispute settlement procedures.

5. When a State committed a wrongful act, the injured State was entitled to demand the cessation of the act and to require appropriate reparation. That was where the principle of proportionality came into play; that principle, which was clearly affirmed in draft article 52, should apply only to the level of measures necessary to ensure that the State having committed the wrongful act honoured its obligations. Countermeasures could only be proportional to the harm suffered and should not go beyond that level. With respect to collective countermeasures, the Algerian delegation would have difficulty accepting the idea that the right to react could be delegated to a group of countries acting outside any institutional framework, as the Commission's report seemed to envisage; that subject deserved further discussion and analysis.

6. With respect to Part One, chapter V, of the draft articles, which concerned circumstances precluding wrongfulness, Algeria fully shared the views expressed by the Commission and endorsed the deletion of draft article 42, paragraph 4, concerning penal

consequences, since it could not conceive of such consequences in international law with regard to States. The series of draft articles on countermeasures seemed, on the whole, to be consistent with the approach based on the unequal ability of States to take such actions. In general, his delegation supported the provisions of those draft articles, which tended to restrict States' freedom of action in the area of countermeasures.

7. The draft articles provided that an injured State that took countermeasures must fulfil its dispute settlement obligations under Part Three of the draft or any other mandatory dispute settlement procedure in force between the States concerned. He was satisfied with the Commission's approach to the use of certain means of international dispute settlement in relation to the adoption of countermeasures. The aim was to give preference, in all cases, to the principle of the peaceful settlement of international disputes. However, apart from mandatory dispute settlement procedures contained in binding legal instruments opposable to the parties to the dispute, the consent of States remained the crucial factor for the use of any means of dispute settlement, and Algeria's position was close to that of the Commission in that regard. In any event, the question of whether or not to include the issue of dispute settlement in the draft articles would depend on the final form of the draft; the views expressed on that subject were still very divergent.

8. In conclusion, he stressed that countermeasures should play a positive and constructive role to the extent that their aims should include only the cessation of the wrongful act, the restoration of respect for international law and reparation of the harm caused, and that they must not have consequences that could endanger international peace and security. The Commission had done important work on State responsibility, but must still complete the consideration of a number of pending issues, such as the definition of an injured State, before it could bring that ambitious undertaking to a successful conclusion.

9. **Mr. Hmoud** (Jordan) said that the text under consideration was a major improvement over the one adopted on first reading in 1996. It was better structured, simpler and more consistent. Moreover, it avoided controversial issues that were not necessarily within the scope of the draft articles on State responsibility. Instead, it focused on the consequences of internationally wrongful acts; that issue had proved to be problematic and confused in the first reading.

10. His delegation welcomed the deletion of former draft article 19, which had distinguished between the civil and criminal liability of States in international law and had contributed to the controversy on the notion of international crimes. Furthermore, by giving examples of international crimes, former draft article 19 had given rise to ideological conflict and had allowed political considerations to have a bearing on States' acceptance of that notion.

11. The introduction, in Part Two, of a new chapter III entitled "Serious breaches of essential obligations to the international community" reflected a clever approach that avoided the shortcomings of former draft article 19 while subjecting serious breaches of obligations *erga omnes* to a special regime of State responsibility. However, the concept of criminal liability of a State was not entirely absent from the draft articles adopted on second reading. The notion of punitive damages had been retained in paragraph 1 of new draft article 42, which referred to damages reflecting the "gravity" of the breach.

12. While his delegation agreed that the concept of State "crimes" should not be the subject of debate in the context of the adoption of the draft articles on State responsibility, it welcomed the fact that the concept of *actio popularis* was envisaged in the draft articles, including the obligations set forth in article 42, paragraph 2. The collective reaction of the international community of States to a serious breach of the obligations owed to it and essential for the protection of its fundamental interests was an important deterrent. Furthermore, it encouraged the cessation of the wrongful act and contributed to the realization of the forms of reparation sought. His delegation had noted that the collective reaction of States should not be understood as overlapping with the enforcement measures provided for in Chapter VII of the Charter of the United Nations, which were among the prerogatives of the Security Council in maintaining international peace and security. Draft article 59 provided adequate safeguards in that respect.

13. The definition of the injured State, as adopted on first reading of the draft articles, had created confusion between the rights of the injured State and those of States that were not necessarily injured by the commission of an internationally wrongful act but had a legitimate interest in the fulfilment of the obligation breached. That applied, in particular, to the breach of obligations *erga omnes* and to the "right" of interested

States to invoke the responsibility of the State committing the wrongful act, as suggested by the International Court of Justice in the *Barcelona Traction* case. The introduction of a new part, part two bis, on second reading of the draft articles, was an interesting effort by the Special Rapporteur to establish a distinction between the rights of injured States and those of non-injured but legally interested States. His delegation considered, however, that the new draft articles did not distinguish adequately between the concept of the State "injured" because the breach of the obligation was "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned" and the concept of the "non-injured" State that had a collective interest in the obligation breached. In practice, problems would arise as to the capacity of a State to invoke responsibility, particularly in the case of a breach of multilateral obligations. The threshold that qualified a State to invoke responsibility as an injured State, because of a breach of an integral obligation or an obligation owed to the international community, must be better defined.

14. Since the *Barcelona Traction* case, there had been much debate on the issue of obligations owed to the international community as a whole in the fulfilment of which all States had a legal interest. While the draft articles on State responsibility had emphasized the concept of respect for obligations *erga omnes* and had provided for the concept's implementation, first, through the invocation of State responsibility and, second, through the regime of countermeasures, those obligations remained ill defined in international law. Although definition was not perhaps the goal of the draft articles on State responsibility, legal scholars must nevertheless endeavour to codify those obligations so as to avoid problems relating to both their definition and the capacity to invoke responsibility.

15. His delegation considered that the time had come to codify the legal regime of countermeasures. While the approach to that subject adopted by the Special Rapporteur on second reading of the draft articles was creative and progressive, it did not necessarily undermine the legal value of the regime. On the contrary, the exercise was necessary in order to safeguard the sovereignty of weaker States in the face of political countermeasures that were neither defined, nor impartial. Furthermore, the countermeasures regime should not be interpreted as an encroachment on the authority of the Security Council under Chapter VII of the Charter of the United Nations. Draft article 59 should provide the necessary guarantees in that respect to those who considered that there was an overlap between the two regimes of measures. Countermeasures could in fact be necessary to ensure that the State committing the internationally wrongful act ceased its action and made reparation for the damage caused.

16. Some considered that the draft articles on countermeasures were "punitive". In that respect, it should be pointed out that the regime of countermeasures, or reprisals not involving the use of force, already existed in international law for the purpose of obtaining reparation from the responsible State and securing the reversion to a situation of legality. Thus, as long as the goal of the countermeasures was to ensure respect for obligations, it was irrelevant how they were "described". Furthermore, the draft articles included all the necessary safeguards to ensure the legality of the measures taken and those safeguards went further than the case law on countermeasures. His delegation wished, however, to make certain comments regarding countermeasures, which it trusted would be taken into account by the Commission on second reading.

17. Excessive or disproportionate countermeasures "authorized" the responsible State to take retaliatory countermeasures. Such a situation might very well arise, and the consequences of such countermeasures, including escalation and the potential use of force, must be carefully considered. Draft article 54 introduced the new concept of collective countermeasures, which followed to a certain extent in the footsteps of the concept of collective self-defence. While it was acceptable to take collective countermeasures in the context of an initiative undertaken at the request of or on behalf of an "injured State", the issue of whether to authorize "any" State to take countermeasures against the author of a serious breach of the essential obligations owed to the international community needed to be studied further. It was hard to envisage how the principle of proportionality could be respected if "any" State was authorized to take countermeasures, as it deemed appropriate. Moreover, such countermeasures could well provoke an escalation, instead of restoring legality. Lastly, the obligation of the States taking

countermeasures to cooperate "as far as possible" was poorly defined, which would surely cast doubt on the legality of their actions while failing to contain countermeasures within their legal framework.

18. His delegation hoped that the Commission would complete its work on State responsibility and conclude the second reading by the end of its next session, in 2001. As to the form that the draft articles should take, it would favour a draft convention, provided that the comments just made were taken into consideration.

19. **Mr. Grasselli** (Slovenia) said that he would focus primarily on chapter IV of the Commission's report, which dealt with State responsibility. The Commission's decision to include in its report the text of the draft articles not yet officially adopted should facilitate the timely completion of work on the text.

20. With regard to the structure, part three of the 1996 draft had been completely deleted, on the assumption that the draft articles would not take the form of a convention. His delegation considered that, at the current stage of the work, the elaboration of a comprehensive dispute settlement system could be suspended, but it was still too early to decide what form the draft articles would take. However, if they were to take the form of an international convention, it would then be necessary to introduce a dispute settlement system.

21. Furthermore, with the inclusion of countermeasures in part two bis — countermeasures could not be taken if the dispute was submitted in good faith to a competent court or tribunal — regulation of dispute settlement was advisable. Article 23 was the only article from Part One to have been submitted to the Commission by the Drafting Committee and his delegation supported its inclusion, which was well founded.

22. His delegation agreed in principle with the concept of full reparation set out in article 31. The new paragraph 2 referred to damage, "whether material or moral", but tribunals were cautious in respect of non-material damage and a clause so general, lacking a concise definition, would not provide them with any clarification. Moreover, it was questionable whether the same concept of moral damage was applicable to all forms of reparation, namely, restitution, compensation and satisfaction. Article 31 did not take into account the mode of the breach. In law, if the responsible State was obliged to provide reparation, the responsibility, and thus the reparation, would differ depending on whether the wrongful act had been committed intentionally or through negligence, and the article should take that into account.

23. Slovenia took it that, in article 36, according to which a State responsible for an internationally wrongful act was under an obligation to make restitution, provided and to the extent that restitution was "not materially impossible", the expression "not materially impossible" covered those cases in which full reparation would deprive the responsible State of its means of subsistence. With regard to article 34, his delegation would like to see the inclusion of a general provision imposing an obligation *erga omnes* on the responsible State among the general principles contained in Chapter I of Part Two. There was no doubt that the obligations owed to the international community as a whole were those that arose from a violation of the peremptory norms of international law. The fact that the specific content of those norms was not defined did not prevent their inclusion as a general principle. In practice, a general principle would not be sufficient. That was why the draft articles should cover the most fundamental obligations, those that were owed to the international community as a whole and the most serious breaches of those obligations. Slovenia was not unaware of the problems raised by the notion of international crime as a category of internationally wrongful acts and did not wish to restart the debate on the distinction between crimes and delicts. On the contrary, it supported the general approach adopted by the Special Rapporteur and the Commission. The compromise approach and the inclusion of serious breaches of essential obligations to the international community in a separate chapter of the draft articles would permit a balance to be found. However, the problem of how to define serious breaches still remained. A definition had been included in the draft articles that had been provisionally adopted in 1980 and Slovenia was of the view that the Commission should carefully consider the question.

24. The articles on the forms of reparation had been more or less reformulated with a view to strengthening the obligation of the responsible State. The delegation of Slovenia approved of that decision but believed that caution must be exercised, since in certain cases moderation was necessary. In that regard, it was preferable either to retain subparagraph (d) as it stood in the 1996 draft articles which envisaged situations in

which restitution would seriously impair the economic stability of the responsible State, or to at least make it clear that the subparagraph removed was covered by the new subparagraph (b).

25. Article 39 provided for interest, whatever the form of reparation. Satisfaction, however, was essentially an expression of regrets and an acknowledgement of a breach that was solely concerned with damages which were not economically quantifiable, and it was therefore logical that it should be excluded from the provision.

26. The delegation of Slovenia supported the approach adopted by the Commission, which was not to give too broad a definition of the injured State and to draw a distinction between States that were individually injured and those which, while not directly injured, nevertheless had a legal interest in the performance of the obligation. The articles concerned with the invocation of responsibility, which were based on the provisions of the Vienna Convention on the Law of Treaties, set out the procedure and established clear rules in the matter. The work of the Commission in the field of diplomatic protection would permit the elaboration of rules that could be applied to questions of the nationality of claims and exhaustion of domestic remedies. The delegation of Slovenia was of the view that article 49 (2) (b), which provided that a State not directly injured was entitled to claim reparation in the interest of the injured State or of the beneficiaries of the obligation breached, was questionable and proposed that the words "of the injured State or" should be deleted from the paragraph.

27. On the subject of countermeasures, Slovenia was of the view that, while the question should be included in the codification of the rules on State responsibility, it was different from State responsibility and merited separate treatment. The Commission had carefully considered the question, including the right of any State, under certain conditions, to take countermeasures in cases of serious breaches of obligations. In certain circumstances, such as in the case of serious and systematic human rights violations, the proposed rules could certainly be justified but, because of its broad scope, risked at the same time giving rise to abuses.

28. **Mr. Jacovides** (Cyprus) recalled that he had stated 10 years earlier that, while State responsibility had concentrated primarily on responsibility for injury to aliens, with the development of *jus cogens* and its acceptance in the Vienna Convention on the Law of Treaties and the existence of hierarchically higher rules as set out in the United Nations Charter, the topic of State responsibility had been placed on a much broader foundation and it was now recognized, including by the International Court of Justice, that obligations *erga omnes* existed and that the interest of the international community as a whole and of international public order needed to be taken into account. The Commission must ensure that the expectations of the international community, and in particular of the new States that had come into existence after the classical rules of international law on that topic had been formulated were not disappointed.

29. In the view of the delegation of Cyprus, that position was still valid. While it was understandable that the pendulum might swing backwards towards the middle ground from extreme and controversial positions in the light of the constant evolution of international law, care should be taken not to allow it to swing back too far to the traditional conventional approach at the expense of progressive notions imported into the law largely as a result of the impact of newly independent States.

30. Turning to the current text, several issues remained outstanding. On the question of what form the draft articles should take, the delegation of Cyprus, together with other States, notably the Nordic States, would prefer that they be adopted as a legally binding convention, alongside such major codification projects as the Vienna Convention on the Law of Treaties, the United Nations Convention on the Law of the Sea and, more recently, the Rome Statute of the International Criminal Court. The subject was too important to have it treated in a lesser fashion, such as a model law or a declaration. However, Cyprus was not precluding any other alternatives, provided that its basic concerns were satisfied. Cyprus had consistently advocated the position that all multilateral law-making treaties concluded under the auspices of the United Nations should include an effective, comprehensive, expeditious and viable dispute settlement system entailing a binding decision regarding disputes arising out of the substantive provisions of the convention in question. That position was dictated both by reason of the attachment of Cyprus to the general principle of equal justice under the law and by reason of its national self-interest as a small State which needed the

protection of the law, impartially and objectively administered, in order to safeguard its legitimate rights.

31. Like Hungary, Cyprus also attached special importance to the establishment of an effective dispute settlement mechanism, which was the condition sine qua non of a well-functioning legal regime of State responsibility. The usefulness of the elaboration of comprehensive rules concerning such a mechanism did not depend on the eventual decision on the final form of the text.

32. On countermeasures, the position of Cyprus was that, if they were to be retained at all, their scope should be restricted and narrowly defined, since they lent themselves to abuse at the expense of the weaker States. They should be aimed at restitution and reparation rather than punishment and should be applied objectively and not abusively. They should be subject to binding dispute settlement procedures (preferably in a separate article, immediately following article 50, as had been suggested by the Nordic States). It should also be stressed that armed countermeasures were prohibited under Article 2, paragraph 4, of the Charter of the United Nations, which had become a customary rule of international law. Moreover, other rules of *jus cogens* involving basic human rights rules were not subject to derogation in the case of countermeasures.

33. Indeed, in the context of State responsibility, as in other areas of international law, the concept of *jus cogens* or peremptory norms of international law needed to be clarified, not eroded or ignored. The issue of consent, which must in any case be freely given, should be approached with caution, since the very essence of the notion of *jus cogens* was that it could not be derogated from by agreement between the parties, because that would be incompatible with international public order. Thus, in connection with article 20 of the draft, entitled "Circumstances precluding wrongfulness", Cyprus fully shared the regret which had been expressed by the delegation of Israel that the exception regarding the ineffectiveness of consent in cases of peremptory obligations had not been retained.

34. Concerning serious breaches of essential obligations to the international community, Chapter III represented a compromise in order to overcome the article 19 controversy on the question of international crimes, as distinct from delicts. Such a compromise appeared acceptable, particularly in the light of the development of the notion of individual criminal responsibility, as in the Rome Statute of the International Criminal Court.

35. Cyprus saw the reason for a distinction between States specifically injured by an internationally wrongful act and other States which had a legal interest in the performance of the relevant obligations but which did not suffer economically quantifiable injury. While the legal interest existed for both categories of States, in the practice of States it was the specifically injured State that had the right to reparations.

36. Lastly, his delegation also believed that, whenever restitution was materially impossible, the wrongdoing State Must compensate the specifically injured State, and that compensation should include, in addition to the principal sum, interest and loss of profit. The new article 39 on interest should therefore be retained.

37. **Mr. Anwar** (Indonesia) said that the report of the Special Rapporteur on State responsibility and the comments adopted by the International Law Commission, taking into account the observations of States, provided a good foundation upon which to proceed further on the topic. The result of that work, namely, the draft articles, must be based on generally recognized principles of international law.

38. As for countermeasures, while reserving the right to comment in further detail at a later date, he noted that the rules governing their application were not yet sufficiently clear in the relevant existing law and that, accordingly, only a brief and general reference should be made to them. In any event, any dispute between an injured State and a responsible State should be settled peacefully and not by unilateral recourse to countermeasures.

39. With regard to diplomatic protection, the proposed approach, in which existing international law in that area would be developed with a view to establishing direct recognition of the rights of an individual in the context of human rights protection, or recognition of the use of force as a means by which States could exercise diplomatic protection, complicated the work of the International Law Commission rather than simplifying it. The Commission should confine itself to the strictly technical aspects of the concept of diplomatic protection which were already governed by treaties and

the laws in force. Recourse to the use of force did not fall within the scope of the question under consideration but rather was a topic which should be addressed as a whole in the context of the application of the Charter of the United Nations. Moreover, the concept of a state of necessity, and the duty of humanitarian intervention which the Special Rapporteur mentioned in that connection, were not consistent with the generally accepted principles of international law and should not be included in the consideration of the question of diplomatic protection.

40. With regard to reservations to treaties, an area of international law already codified in the 1969 Vienna Convention, his delegation supported the approach taken by the International Law Commission in preparing a guide for States rather than a new legal instrument. It was pleased at the progress achieved by the International Law Commission, which had just adopted draft guidelines on first reading.

41. In view of the complexity of the topic of international liability for injurious consequences arising out of acts not prohibited by international law, his delegation welcomed the progress achieved by the Special Rapporteur in the elaboration of revised draft articles which were ready for adoption and took into account comments by States and members of the International Law Commission.

42. Lastly, the seminars organized by the International Law Commission, which were of great benefit to students, lawyers and government officials from developing countries wishing to familiarize themselves with the work of the Commission and expand their knowledge of international law, were greatly appreciated. He also thanked Member States who helped finance the fellowships granted to participants from the less wealthy countries out of a concern to ensure equitable geographical representation.

43. **Mr. Czapliński** (Poland) expressed his delegation's satisfaction that the work of the International Law Commission on the question of State responsibility was nearly complete and hoped that it would culminate with the adoption of an international convention under United Nations auspices, although other forms of the text would be acceptable. His delegation accepted the general structure of the draft, as decided by the International Law Commission, and wished to propose amendments to specific articles only.

44. It was his delegation's understanding that draft article 13 was of an intertemporal nature and was aimed at excluding any retroactivity in the application of the provisions. Otherwise, it would duplicate article 12. Article 31 should be amended, if necessary, by a reference to the provisions of the draft dealing with claims brought by directly or indirectly injured States in order to avoid claims for compensation for moral damage, for which reparation was to take the form of satisfaction only. It was linked to article 40, which stated that, in the determination of reparation, account should be taken of the contribution to the damage, which raised the question as to whether there must be damage in order for an internationally wrongful act to be recognized.

45. Article 32, dealing with the irrelevance of internal law, was of great importance not only for the determination of responsibility but also with respect to other aspects of the law on State responsibility, including the origin of such responsibility. His delegation construed the provision as meaning that domestic law could not be relied upon in order to avoid an international obligation and suggested that that provision should be included in Part Four, together with article 33, which covered the same question as article 56 and allowed for reference to other rules of international law applicable to a specific situation. In that connection, reference could be made to article 60 of the Vienna Convention on the Law of Treaties or to other multilateral international conventions providing for self-contained regimes.

46. His delegation accepted the inclusion of the provisions on serious breaches of essential obligations to the international community, contained in paragraph 1 of article 41, which combined the institutions of *jus cogens* and obligations *erga omnes*; however, that provision was not correctly reflected in Part Two bis of the draft articles. Indeed, it was unclear whether reparation claims in cases of obligations *erga omnes* could be brought by every State or whether they must be brought by the international community as a whole. His delegation agreed with the International Law Commission that it would be difficult to achieve a general consensus on that point but it would nonetheless appreciate clarification.

47. As for restitution, his delegation suggested that article 36 should speak of re-establishing the situation which would have existed if the wrongful act had not been committed, which did not necessarily imply that full restitution should be made. Indeed, full restitution might be excluded if it seemed that it would impose an excessive burden on the responsible State. He therefore proposed that the scope of the provisions of article 36 (b) should be extended to cover reparation within the meaning of article 37.

48. His delegation welcomed the inclusion in the draft articles of provisions on countermeasures, to which it proposed two amendments. In paragraph 5 of article 53, the word "and", which connected paragraphs (a) and (b), should be replaced by "or", since the two conditions need not be fulfilled jointly. The wording of paragraph 4 would have to be amended accordingly. His delegation also had serious doubts about the formulation used in article 54, paragraph 2. Indeed, according to article 59, the obligations arising out of the draft articles were without prejudice to the Charter of the United Nations, which gave the Security Council a monopoly on deciding countermeasures. Nonetheless, the Security Council was sometimes unable to agree on action to be taken in the event of a threat to or violation of international peace and security, or when one of its permanent members used the veto to prevent the adoption of certain measures. Moreover, certain serious breaches of international law (draft article 41) were not within the competence of the Security Council. Paragraph 2 of article 54 would thus authorize each State to have recourse to countermeasures in consultation with the other States involved. Although there was a trend in that direction, it hardly reflected the general practice of States. The question should therefore be clarified by the International Law Commission before the draft was adopted in its final version. Lastly, he said that the countermeasures adopted by third (indirectly injured) States should be aimed primarily at the cessation of the internationally wrongful act rather than at obtaining reparation for the directly injured State.

49. In conclusion, while his delegation was prepared to accept the inclusion of the provisions on the right of individuals to invoke the provisions of international law on State responsibility, it was not fully convinced that such an approach did not go beyond the practice of States. Indeed, paragraph 2 of article 34 was unclear as to the relationship between the law on State responsibility and claims for reparation based on private law brought before the national courts of the responsible State. On the other hand, it welcomed the inclusion of article 58 on possible individual criminal responsibility and hoped that its implementation would soon be possible within the context of the work of the International Criminal Court.

50. **Mr. Rogachev** (Russian Federation) highlighted the positive aspects of the report of the Special Rapporteur, which was more concise than the previous version and reflected much more modern norms. It would take time, however, to determine the specific impact on international relations of a number of provisions, such as those dealing with countermeasures, particularly collective countermeasures; serious breaches of obligations to the international community as a whole; and the definition of an injured State.

51. A separate chapter had rightly been devoted to countermeasures, since a wrongful act did not necessarily give rise to the right to resort to countermeasures, which could only be invoked if the State responsible for the wrongful act refused to fulfil the obligations arising from its responsibility. The most complex issue in that regard was the taking of countermeasures by States other than the injured State. It would be unacceptable for any State to take countermeasures at the request of any injured State, because that would give the big Powers the opportunity to play the role of international policemen. The only exception concerned the acts referred to in article 41. There were cases where such relations between States might also fall under the jurisdiction of international organizations responsible for security matters. His delegation intended to submit written comments on that sensitive subject to the Commission.

52. Part Two, Chapter III of the draft, "Serious breaches of essential obligations to the international community", was especially important in view of the extension of the effects of the draft articles to the obligations that States owed to the international community as a whole (article 34, paragraph 1). Increasing globalization was leading to greater interdependence and interaction between States. However, the concept of international community was too broad; it was not a legal concept. Therefore, rather than talking about "serious breaches of essential obligations to the international community", it would be preferable to refer to "serious international

violations". Due to their seriousness, an absolutely clear definition was needed of those violations. Unfortunately, the draft did not have an article containing such a definition; the definition given in passing in article 41, "Application of this chapter", was too general and opened the door to potential abuse. It would be useful to include elements of the definition of crimes given in draft article 19 adopted on first reading. The obvious defects of the definition in draft article 41 were the reference to the systematic nature of the breach and the unnecessary reference to the risk of causing substantial harm to the fundamental interests protected by the obligation in question. Chapter III concerned international responsibility arising from an internationally wrongful act and should therefore be entitled "Responsibility arising from serious breaches ..." and not "Serious breaches ...". Consequently, the title of article 42 should also be amended to read: "Responsibility arising from serious breaches of international obligations". As far as the contents of that article were concerned, it should be noted that in view of the undeniable responsibility of States (obligation not to render assistance to the responsible State in maintaining the situation so created, to cooperate as far as possible to bring the breach to an end), such obligations were also applicable to situations resulting from other types of violations. Moreover, concerning the obligation to cooperate, the qualifying phrase "as far as possible" should be deleted. Lastly, the obligation to cooperate should also be extended to measures guaranteeing the implementation of the responsibility of the State responsible for the internationally wrongful act.

53. The provisions of Chapter V of Part One, "circumstances precluding wrongfulness", were related to the general principles of law, since they were well represented in national law. But article 27, "Consequences of invoking a circumstance precluding wrongfulness", was problematic because it stated that the invocation of a circumstance precluding wrongfulness was "without prejudice to the question of compensation for any material harm or loss caused by the act in question", although it should not be applicable to certain circumstances precluding wrongfulness such as consent, compliance with peremptory norms, self-defence, countermeasures and *force majeure*. On that point, his delegation endorsed the view expressed by the Special Rapporteur in his second report that the question of compensation arose only in cases of distress and necessity. In fact, in such cases, it would be more accurate to refer not to circumstances precluding wrongfulness, but to exemption from responsibility. Otherwise, it was not clear how the question of compensation could arise.

54. The title selected during the debates for Part Two of the draft articles was correct from the legal viewpoint and faithfully reflected the contents of that Part. However, the title of the first article of Part Two, "Legal consequences of an internationally wrongful act" was at variance with its contents. The article correctly stated that it was international responsibility which entailed consequences, and not the internationally wrongful act. Referring to article 34, which defined the scope of international obligations covered by that Part, he said that there should be a full stop after the words "circumstances of the breach", since the reference in that article to beneficiaries other than a State was questionable and required at the very least more discussions on the issue and the inclusion of the concept in articles 49 and 54.

55. With respect to the forms of compensation (chapter II of Part Two of the draft), article 37, "Compensation", gave too broad an interpretation of compensation, including loss of profits, a controversial concept which, in his view, should be the subject of a separate article. Satisfaction (article 38) could be defined as a special form of compensation in cases where the damage was not material, while the acts listed in article 38, acknowledgement of the breach, expression of regret, formal apology, had to be accomplished irrespective of the form of compensation.

56. In Part Four of the draft, "General provisions", instead of using *lex specialis* in the first article, the concept of "special regimes" should be used, since the article dealt not with norms or acts, but specifically with a body of norms which constituted a regime of responsibility. It was a well known fact that the concept of special regime had broad acceptance in international law in terms of both the texts and practice.

57. The draft articles on responsibility could become an important element of the international legal system and could eventually become a draft convention.

58. **Mr. Al-Melhem** (Kuwait) said that, in accordance with the principles of the Charter of the United Nations, it was absolutely necessary to come up with a definition of the responsibility of States for their internationally wrongful acts. Countermeasures were particularly important to the injured State, since they

enabled it to get the responsible State to assume its obligations with respect to cessation and reparation or to negotiate in order to settle the dispute without affecting the rights of that State, in conformity with the principle of reciprocity. His delegation endorsed the proposals put forward by a number of delegations concerning the establishment of criteria and norms with respect to countermeasures to ensure that the latter were not used to harm the responsible State. Moreover, responsibility in all its forms should be defined on the basis of the United Nations Convention on the Law of Treaties. That issue should be the subject of a treaty or, better still, an instrument of the United Nations on the responsibility of States. Cooperation between the different delegations and the Commission was necessary to achieve a consensus so as to put an end to all the wrongful acts committed by some irresponsible States thus giving effect to the provisions of the Charter of the United Nations concerning the maintenance of international peace and security.

59. **Ms. Álvarez Núñez** (Cuba) said that her country attached importance to and had contributed to the consideration of the issue of State responsibility. The Commission had made laudable efforts to replace the concept of State crime by an acceptable definition which clearly established the international responsibility of States in cases of acts of aggression, threat or use of force in international relations and the unilateral imposition of coercive measures. However, her delegation was concerned by the inclusion in article 41 of the concept of serious breaches of essential obligations to the international community and the reference in article 42 to the consequences of such breaches, which should be considered in the light of the delicate link with article 49 on the invocation of responsibility by States other than the injured State and article 54 itself, paragraph 2 of which provided that any State might take countermeasures. The concept of essential obligations for the protection of basic interests, which justified the intervention of States that were not directly injured, should be further clarified because it was directly related to the concepts of *jus cogens* and obligations *erga omnes* with respect to which international codification efforts had not made much progress. Her delegation preferred the term "international community of States" used in the Vienna Convention on the Law of Treaties to the very vague and disturbing term "international community". Moreover, the recognition in article 54, paragraph 2, of the right of any State to take countermeasures in the interest of the beneficiaries of the obligation breached went well beyond the progressive development of international law. The lack of precision in the provisions proposed in the draft articles might lead to the justification of collective sanctions or collective interventions. Therefore, articles 49 and 54, which gave rise to complications, should be deleted and the meaning of the provisions of article 41 should be elucidated.

60. Countermeasures were one of the most controversial aspects of the question of State responsibility because they often served as a pretext for the adoption of unilateral measures such as armed reprisals and other types of intervention. It was therefore important to define them carefully and to set limits on their use. In that respect, the current version of the draft articles was a significant improvement compared with the previous text. In general, the legitimization of reprisals following an illicit act tended to aggravate disputes between States and was used to justify the wrongful use of force — whether direct or indirect.

61. Furthermore, article 54 itself, in paragraph 1, invoked article 49, paragraph 1, which referred to the protection of a collective interest, meaning that a State other than the injured State could act on behalf of the injured State and adopt countermeasures, which were actually collective. That scenario, which involved more risks than benefits, ran counter to the provisions of article 52 concerning the principle of proportionality. Accordingly, it should not fall within the purview of the draft articles and, if it actually occurred, it should be governed by the existing rules of international law, particularly the provisions of the Charter of the United Nations. The same comment applied to provisional countermeasures.

62. Countermeasures therefore required many clarifications and lengthy consideration: they should be taken only as a last resort and under no circumstances should consist of acts which, by their nature and consequences, involved the direct or indirect use of force or were a tactic motivated by purely political considerations, in violation of the principles of the Charter of the United Nations and international law.

63. With regard to the final form of the draft articles, her delegation believed that much still remained to be done to arrive at a working document that was acceptable to everyone and representative of the

practice of States. In a sphere which was so complex at the technical level and so delicate at the political level, it was not advisable to adopt an innovative and revolutionary approach. Although in the past her Government had been in favour of the adoption of conventions under the auspices of the United Nations, her delegation believed that it was premature, at the current stage of the Commission's work, to decide on the form of the draft articles, an issue which States would be able to resolve only after lengthy reflection, when real progress had been made in formulating the text.

64. **Mr. Biato** (Brazil) said that, like many other delegations, his delegation believed that the revised draft articles formed a balanced and technically sound text. The draft articles on the regime governing countermeasures incorporated many novel aspects that had arisen over the years in international practice. Article 51 was especially welcome in that it set out obligations which were not subject to countermeasures, including the obligation to refrain from the use of force and the obligations for the protection of human rights. With regard to the conditions relating to resort to countermeasures, the draft articles emphasized proportionality and the gravity of the wrongful act in question. They also specified that countermeasures must be suspended if the dispute was submitted to arbitration or judicial settlement, which was consistent with the understanding that countermeasures must remain an instrument of last resort.

65. It was important that countermeasures should not become a punitive instrument that opened the door to the abuse of power. It was for that reason that further consideration needed to be given to the criteria for determining the admissibility of countermeasures and their severity, as well as the question of the rights of third States which were not directly injured, especially the right of the third State to take countermeasures on behalf of the injured State, as well as the notion of breaches of obligations *erga omnes*. Lastly, the question of awarding damages reflecting the gravity of the breach also posed difficulties.

66. The formula adopted to resolve the crucial issue raised by article 19 was ingenious. The notion of a serious breach involving failure to fulfil fundamental obligations, risking substantial harm to the interests of other States, seemed desirable in that it obliged other States to cooperate to bring the breach to an end.

67. His delegation took note of the decision to delete the section on the settlement of disputes on the understanding that that matter would be taken up when the Commission came to decide on the final form of the draft articles. In that respect, however compelling the arguments put forward in favour of a multilateral declaration might be, Brazil felt that such a declaration would be of little value, since it would not be a legally binding document. His delegation believed that the Commission should not confine itself to codifying existing international norms, but must strive to contribute to the progressive development of international law, particularly on a matter as important as State responsibility.

68. **Mr. Thessin** (United States of America) said that the draft articles should reflect customary international law. Yet, despite the significant improvements which had been made to the text, certain provisions continued to deviate from customary international law. There were three areas in which the draft articles could be better aligned with international practice: countermeasures, serious breaches of essential obligations to the international community, and the definition of an "injured State".

69. The provisions relating to countermeasures set forth restrictions that did not reflect customary international law. In particular, under customary international law, there was no duty to negotiate before a State could resort to using countermeasures, as envisaged in article 53, paragraph 2. Moreover, while paragraph 3 would allow provisional and urgent countermeasures to be taken, paragraph 5 required that all countermeasures must be suspended if the dispute was submitted to a court or tribunal. His delegation was concerned that a blanket constraint of that type could be exploited by the responsible State to the detriment of the injured State. At a minimum, it should be clarified that the provisional and urgent countermeasures envisaged in article 53, paragraph 3, were not covered by paragraph 5 of that article.

70. His delegation recognized that there were significant differences of opinion in the international community on the subject of countermeasures. It noted that countermeasures were the only circumstance precluding wrongfulness that was the subject of detailed treatment in the draft articles. Since the Commission intended to complete its work on State responsibility at its next session, it would have only a limited amount of time to devote to the revisions of the

current text which a number of States, including the United States of America, believed were necessary. Accordingly, his delegation proposed that the Commission should consider at its next session a range of issues with respect to countermeasures, including whether the provisions relating to countermeasures in the draft articles on State responsibility could be deleted, or, if that was not possible, how the current text could best be revised to better reflect customary law.

71. His delegation was pleased that the concept of international crimes had been removed from the draft articles. However, the definition of a "serious breach" of essential obligations to the international community, in article 41, paragraph 2, was too vague and over-inclusive. There was nothing to be gained from distinguishing between serious breaches and other breaches, and that distinction did not exist in customary international law.

72. The wording of article 42 (Consequences of serious breaches of obligations to the international community as a whole) was also unsatisfactory. In particular, some might interpret the obligation to pay damages reflecting the gravity of the breach, set forth in paragraph 1, as allowing punitive damages for serious breaches, which was contrary to customary international law. Similarly, his delegation was not convinced that the obligations envisaged in article 42, paragraph 3, had a firm basis in customary international law. Noting that the representative of the United Kingdom had proposed adding some form of saving clause to the effect that the draft articles were without prejudice to any regime that might be established to deal with serious violations of obligations *erga omnes*, his delegation invited the Commission to give careful consideration to that proposal which would make it possible to preserve the structure and objective of the draft articles as a whole.

73. With regard to the definition of an "injured State", his delegation was pleased that the Commission had drawn a distinction between States that were directly injured and those which did not directly sustain injury. That distinction was a sound one, but the Commission could try to narrow the definition of an injured State even further. In that respect, it should be noted that article 43 (b) (ii) provided that if an obligation breached was "of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned", the State concerned could claim injured status. That language was too broad, and could defeat the purpose of drawing a distinction between injured States and other States.

74. Regarding the form which the draft articles on State responsibility should take, in the view of the United States it would be neither useful nor productive to adopt them in the form of a convention. Since the text dealt with secondary rules of international law, the treaty form did not seem appropriate. If the Commission decided not to codify the draft articles in the form of a convention, it could continue to leave aside the part dealing with the settlement of disputes, which had been included in the draft adopted on first reading and had been omitted from the version currently under consideration.

75. Concerning diplomatic protection, the United States believed that it was clearly a discretionary right of the State, and categorically rejected the notion that it was a right of the individual. Moreover, the progressive development of international law should be taking place only in areas where there were gaps in customary international law. Diplomatic protection was not one of them.

76. His delegation was not persuaded that it made sense to consider unilateral acts of States for the purposes of codification or progressive development. To prepare draft articles on the topic might restrict the flexibility which States enjoyed in that area. Since unilateral acts were extremely varied, one might ask whether it was possible or sensible to devise general rules to apply to each and every case. It would be better if the Special Rapporteur were to confine himself, at least in the first instance, to a survey of State practice.

77. Concerning reservations to treaties, his delegation thought it would be a good idea for the Commission to compile a guide to practice dealing with reservations and interpretative declarations.

78. Lastly, with regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation thought the topic was of particular importance in the field of international environmental law. It supported the Commission's decision to defer consideration of the question until the draft articles on the prevention of transboundary harm had been adopted on second reading.

79. **Mr. Zellweger** (Observer for Switzerland) welcomed the Commission's decision to exclude the notion of crime from the draft articles. The concept of a serious breach of fundamental obligations towards the international community seemed to be more useful. He would confine himself to commenting on the question of reparation and countermeasures.

80. With regard to reparation, draft article 31 raised the issue of causal responsibility. The existence of a cause-and-effect relationship between a breach of international law and the presence of damage was enough to make the State committing the breach responsible for the damage. Although that type of responsibility held good for many situations, it was possible that a minor violation, through a combination of exceptional circumstances, might lead to considerable damage which the responsible State had been unable to anticipate. He wondered if it might not be advisable to make provision for a limited and mitigated form of responsibility in cases where there was no intention of causing harm or where it was impossible to anticipate the damage at the time when the internationally wrongful act was committed. Noting the distinction drawn in draft article 40 between a contribution to the damage made by wilful, as opposed to negligent, action or omission, he took the view that the same distinction should be drawn with regard to the State responsible for the breach of international law.

81. With regards to countermeasures, he agreed with the Commission's general approach. It would be better to regulate countermeasures, with a view to limiting recourse to them, than not to deal with the issue at all. Without objecting to the inclusion of provisions on countermeasures in the draft articles, he thought they should feature in a separate part. They were currently in part two of the draft articles, which might give the impression that countermeasures derived from State responsibility. That was not the interpretation of his country.

82. Another difficulty lay in the relationship between draft articles 50 to 55 and draft article 23. According to draft article 23, an act of a State which was not in conformity with its international obligations would not be wrongful if and to the extent that the act constituted a countermeasure directed towards another State under the conditions set out in articles 50 to 55. But draft article 23 was part of a list of circumstances precluding wrongfulness. If a provision on countermeasures was included in such a list, a question inevitably arose as to the lawfulness and legitimacy of countermeasures in situations other than self-defence, distress or state of necessity. That was a fundamental question which was not adequately answered in draft articles 50 to 55.

83. **Mr. Yamada** (Chairman of the International Law Commission) introduced the second Part of the report of the Commission (A/55/10). With regard to chapter V (Diplomatic protection), he explained that the starting-point for the Special Rapporteur had been that diplomatic protection remained an important tool for the defence of human rights. Although individuals participated in the international legal system and had rights under it, their remedies remained limited.

84. According to the Special Rapporteur, draft article 1 aimed not so much to define the topic as to describe it. Some members of the Commission felt the Special Rapporteur had perhaps over-emphasized the role of diplomatic protection as a tool for protecting human rights. There had also been discussion as to whether diplomatic protection could only be extended when a wrongful act had already occurred, or whether a Government could also extend such protection to prevent injury to one of its nationals.

85. With regard to the nature of diplomatic protection, two different views had been expressed. The first was that diplomatic protection was a right of the individual. The constitutions of a number of States upheld the right of nationals to diplomatic protection, a trend which was compatible with the development of human rights protection in contemporary international law. According to the second view, shared by many members of the Commission, diplomatic protection was a discretionary right of the State. A State had the right to present a claim to another State for a wrongful act committed by the latter, even if it was not the State itself but its national which had suffered the injury. However, there was no obligation on the State to present a claim on behalf of its injured nationals. The constitutional obligation to extend diplomatic protection to nationals had no bearing on international law with regard to the subject.

86. Draft article 2 raised two highly controversial questions: first, the question whether international law permitted the use of force to protect nationals and second, whether that matter fell within the sphere of diplomatic protection. Two divergent views had been expressed. According to the first view, draft article 2 was objectionable because it did not include a

categorical rejection of the threat or use of force in the exercise of diplomatic protection. Although there were circumstances exempting a State from responsibility, such as imminent danger or a state of necessity, in the context of diplomatic protection any rule permitting, justifying or legitimizing the use of force was dangerous and unacceptable. According to another view, the question of the use of force was not part of the topic and lay outside the Commission's mandate. Diplomatic protection was related to the law of responsibility and was essentially concerned with the admissibility of claims. The mechanisms by which protection could be given to individuals covered a wide range of actions, including peacekeeping, consular activities and so forth. Moreover, the question of the use of force by a State to protect its nationals abroad could not be considered in isolation from the whole question of the use of force and the application of the Charter of the United Nations. The debate in the Commission had made it clear that draft article 2 was unacceptable and should therefore be deleted.

87. Draft article 3 raised the question of whose right was asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. It attempted to codify the principle of diplomatic protection in its traditional form, recognizing it as a right of the State which the State could exercise at its discretion, subject to draft article 4, whenever one of its nationals was injured by another State. Thus the exercise of that right was not limited to instances of large-scale and systematic human rights violations. Moreover, the State of nationality was not obliged to refrain from exercising that right when there was a remedy open to the individual concerned under a treaty relating to human rights or foreign investment. In principle, according to draft article 3, a State was not bound to refrain from exercising diplomatic protection, because its own right was violated when its national was injured. Draft article 3, which followed the traditional view derived from the judgement of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, had been found acceptable in principle. However, some members had said that the State's claim should be more strongly emphasized. Others had taken the view that greater emphasis should be placed on the fact that the injury to the national was the consequence of a breach of international law.

88. Article 4 dealt with another controversial issue and, as admitted by the Special Rapporteur himself, was a proposal *de lege ferenda*. According to the traditional doctrine, a State had an absolute right to decide whether or not to exercise diplomatic protection on behalf of its nationals. It was under no obligation to do so. Consequently, a national injured abroad had no right to diplomatic protection under international law. The Special Rapporteur, relying on recent constitutional provisions providing a right to diplomatic protection for nationals, had been of the view that perhaps that practice should be extended to international law as well. The Commission as a whole had not been able to support that proposition, of which they had found no evidence in State practice. The article had therefore been deleted.

89. Article 5 dealt with the requirement of nationality for diplomatic protection. The views in the Commission had differed. Some members had felt that it placed too much emphasis on nationality as a requirement for diplomatic protection and did not take account of the fact of modern-day life that nationals frequently established residence abroad and thus established a more substantial link with their State of residence than with their State of nationality. Other members of the Commission favoured the traditional view supported by the *Nottebohm* decision.

90. In addition, some members of the Commission had expressed the view that it would be difficult to discuss article 5 in the absence of reference to the questions of denial of justice and the exhaustion of local remedies. For an injury to be attributable to a State, there had to be denial of justice, meaning that there had to be no further possibilities for obtaining reparation or satisfaction from the State to which the act was attributable. Once all local administrative and legal remedies had been exhausted, and if the injury caused by the breach of the international obligation had not been repaired, the diplomatic protection procedure could be started. It had also been generally agreed that article 5 should not deal with methods of acquisition of nationality. What was involved was the right of a State to protect a national, and not the circumstances in which a State could grant nationality.

91. Article 6 dealt with the question of dual or multiple nationality and the requirement of dominant or effective nationality. Members of the Commission had recognized that the development of the principle of dominant or effective nationality had been

accompanied by a significant change in the approach to the question of the exercise of diplomatic protection on behalf of persons with dual or multiple nationality. The Special Rapporteur had given many examples, mainly judicial decisions applying the principle of dominant or effective nationality in cases of dual nationality. Some members of the Commission, however, had considered that when it came to applying the principle against another State of nationality of the person concerned, there was as yet insufficient support in customary international law for the codification of such a rule. Some other members of the Commission, supporting article 6, had reiterated that the article reflected current thinking in international law and had rejected the argument that dual nationals should be subjected to disadvantages in respect of diplomatic protection because of the advantages they might otherwise gain from their status as dual nationals.

92. Article 7, which dealt with the exercise of diplomatic protection on behalf of dual or multiple nationals against third States, namely, States of which the individual was not a national, provided that any State of nationality could exercise diplomatic protection without having to prove that there was an effective link between it and the individual. There had been general support in the Commission for that article. There had also been substantial support for paragraph 2 of the article, which provided for joint exercise of diplomatic protection by multiple States of nationality. It had, however, been noted that the article or the commentary to it should anticipate some practical problems that might occur in such situations. For example, what would happen if one State of nationality waived its right to exercise diplomatic protection or declared itself satisfied by the response of the responding State, while the other State of nationality continued with its claim?

93. Article 8, as proposed by the Special Rapporteur, had been the last article discussed by the Commission at its most recent session. The article dealt with diplomatic protection of stateless persons or refugees by the State of residence, and, in the view of the Special Rapporteur, was *de lege ferenda*. The views in the Commission had differed. Some members had found that such a progressive development of international law was warranted by contemporary international law, which could not be indifferent to the plight of refugees and stateless persons. Others, however, considered that in the case of protection of refugees, the better could become the enemy of the good. If States believed that the granting of refugee status was the first step towards the granting of nationality and that any exercise of diplomatic protection was in effect a statement to the individual that the granting of refugee status implied the granting of nationality, that would be yet another disincentive to the granting of refugee status. Refugee status in the classical sense of the term was an extremely important weapon for the protection of individuals against persecution or the well-founded fear of persecution. If the Commission made the burden too heavy, the serious difficulties that already existed in maintaining the classical system would be exacerbated. However, if diplomatic protection was conceived as being at the discretion of the State and not as the right of the individual, then the article, with some modification relating to the conditions under which such protection might be exercised, would be more acceptable to those members.

94. The Commission had established Informal Consultations to consider some of the issues raised in articles 1, 3 and 6 in more detail. Having considered the report of those consultations, it had decided to refer articles 1, 3 and 5 to 8 to the Drafting Committee, together with that report. The Commission would welcome any views that representatives might have on the articles proposed, in particular on the issues and questions mentioned in paragraph 24 of the Commission's report with regard to that topic.

95. Turning to chapter VI of the Commission's report, on unilateral acts of States, he recalled that the Commission had before it the third report of the Special Rapporteur and the report of the Secretary-General containing the replies of Governments to the questionnaire sent to them in the previous year. Paragraphs 510 to 528 of the Commission's report contained a summary of the presentation which the Special Rapporteur had made of his third report, and paragraphs 529 to 619 the summary of the debate on that report, as well as the concluding remarks by the Special Rapporteur. The texts of the draft articles proposed by the Special Rapporteur were contained in footnotes 117 to 121 of the report.

96. The general comments contained in the summary referred *in extenso* to the question of the relevance of the topic as well as to the question of its appropriateness for codification. In that connection, he drew attention to paragraphs 533 and 534 of the report.

Some members of the Commission had noted that the great diversity of unilateral acts present in the practice of States was a factor which rendered difficult a general exercise of codification in their regard and had suggested that a step by step approach dealing separately with each category of act might be more appropriate. In the view of other members of the Commission, it would be appropriate to divide the draft articles into two parts: the first would establish general provisions applicable to all unilateral acts and the second, provisions applicable to specific categories of unilateral acts which, owing to their distinctive character, could not be regulated in a uniform way. Members of the Commission had also stressed the importance of a good survey of State practice in any attempt to codify the topic and had encouraged the Special Rapporteur to reflect such practice extensively in his reports. Other general comments had referred to the relationship between the draft articles on unilateral acts and the 1969 Vienna Convention on the Law of Treaties and had supported the concept of flexible parallelism developed by the Special Rapporteur in his report. Various views had also been expressed on the question whether the concept of estoppel should be taken up within the context of unilateral acts of States. For some members, estoppel could be omitted for the time being from the general study of unilateral acts, and taken up later to determine its possible impact in particular contexts. Some other members had adopted a somewhat more active approach to that question, as reflected in the summary.

97. The comments on draft article 1 had revolved around the main elements of the proposed definition of a unilateral act. It had been observed that the main differences between the previous and the new definition of unilateral acts consisted of the deletion of the requirement that such acts be "autonomous", the replacement of the expression "the intention of acquiring international legal obligations" by the expression "the intention of producing legal effects" and the replacement of the requirement of "public formulation" by the condition that the act had to be known to the State or international organization concerned. Specific comments had also been made on the following elements of the proposed definition: "the expression of will with the intention to produce legal effects"; the phrase "in relation to one or more other States or international organizations" which in the proposed definition qualified the words "legal effects"; the word "unequivocal" which qualified the words "expression of will" as well as the words "and which is known to that State or international organization" which in the proposed definition related to the expression of will.

98. Mixed reactions had been expressed regarding the notion of "autonomy", which the Special Rapporteur, following the recommendation of the 1999 Working Group, had deleted from the proposed definition. It had been noted in that connection that a unilateral act could not produce effects unless some form of authorization to do so existed under general international law. That authorization could be specific, for example, where States were authorized to fix unilaterally the extent of their territorial waters within a limit of 12 nautical miles from the baseline, or it could be more general, for example, where States were authorized unilaterally to enter into commitments limiting their sovereign authority. But unilateral acts were never autonomous. Acts that had no basis in international law were invalid. It was a matter not of definition but of validity or lawfulness. In another view, the term "autonomy" was perhaps not entirely satisfactory, but the idea of non-dependence as a characteristic of unilateral acts might deserve to be discussed and might help in determining the scope of the draft articles. Also in that connection, some members had been in favour of reintroducing an article on the "scope" of the draft articles, which had been deleted by the Special Rapporteur.

99. Draft article 2, on the capacity of States to formulate unilateral acts, had generally been supported, although some drafting suggestions had been made. With regard to draft article 3, dealing with persons authorized to formulate unilateral acts on behalf of the State, support had been expressed in general for both its paragraphs, although a number of substantive and drafting amendments, reflected in the summary, had been proposed, including a proposal to the effect that the draft article should be supplemented by adding as a third paragraph the existing text of draft article 4. The latter, on subsequent confirmation of an act formulated by a person not authorized for that purpose, had received general approval, although some members had expressed reservations regarding the word "expressly" relating to the confirmation. They had wondered why a unilateral act could not be confirmed tacitly, since the confirmation of a unilateral act should be governed by the same rules as its formulation.

100. Support had been expressed in the Commission for the deletion of former draft article 6 on the

expression of consent. On the question of silence and unilateral acts, which the Special Rapporteur had dealt with in his third report in connection with the deletion of previous draft article 6, differing views had been expressed. In the view of some members, silence could not be regarded as a unilateral act in the strict sense since it lacked intention, which was one of the important elements of the definition of a unilateral act. Consequently, the question of silence and unilateral acts did not belong in the draft articles. Other members were of a different view. They had emphasized that while some kinds of silence definitely did not and could not constitute a unilateral act, others might be described as an intentional "eloquent silence", expressive of acquiescence and therefore constituting such an act. The *Temple of Preah Vihear* case provided an example.

101. Concerning draft article 5, dealing with invalidity of unilateral acts, some members had emphasized its relationship with a necessary provision on the conditions of validity of the unilateral act, which had not yet been formulated. They considered that a study on the conditions determining the validity of unilateral acts would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the expression of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity.

102. The connection with a possible provision on revocation of unilateral acts had also been emphasized. The point had been made that if a unilateral act could be revoked it was in the interest of the State to use that method rather than to invoke a cause of invalidity. The causes of invalidity should essentially concern unilateral acts that were not revocable, or in other words those linking the State formulating the act to another entity. It had also been suggested that a distinction should be drawn between cases where an act could be invalidated only if a ground of invalidity was invoked by a State (relative invalidity) and cases where the invalidity was a sanction imposed by law or stemmed directly from international law (absolute or *ex lege* invalidity). Specific comments, reflected in the summary, had also been made in connection with each of the eight grounds for invalidity proposed by the Special Rapporteur in his draft article.

103. As a result of the debate, the Commission had decided to reconvene the Working Group on unilateral acts of States, and had also decided to refer draft articles 1 to 4 to the Drafting Committee and draft article 5 to the Working Group for further consideration. The Working Group had held two preliminary meetings during the first part of the Commission's session. However, because it had to move on to consider other topics, the Working Group had not had time to hold further meetings and, in particular, had not been able to consider draft article 5, on invalidity of unilateral acts, which had been referred to it. The Working Group had indicated that even if, due to the aforementioned circumstances, it had not been possible to draw final conclusions from the debates held during the two meetings, there had been a strong measure of support for the points concerning further work on the topic which were listed in paragraph 621 of the report. The Commission had not had time to consider the report of the Working Group, but had agreed that it would be useful to seek the views of Governments on the points reflected in subparagraphs (a), (b) and (c) of paragraph 621 of the report, and that the Secretariat should proceed along the lines suggested in subparagraph (d).

104. *Mr. Politi (Italy) took the Chair.*

105. **Mr. Abraham** (France) observed that the exercise of diplomatic protection, subject to certain conditions established in 1924 by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case, sometimes raised difficulties and that consideration of the matter by the Commission therefore seemed particularly opportune.

106. The Special Rapporteur had called article 1 "Scope", which was somewhat vague. Paragraph 1 referred to the first of the two preconditions for the exercise of diplomatic protection: that relating to the existence of an injury caused to a national by reason of an internationally wrongful act attributable to a State. That paragraph, in addition to raising certain drafting difficulties, was inappropriate because it was incomplete. If it was retained, it should recall the two conditions for the exercise of diplomatic protection. In point of fact, the second condition, namely the exhaustion of domestic remedies, was just as important as the first. Why refer to the first condition and not to the second, even as a matter of principle? The two conditions should be recalled at the outset and then dealt with in greater detail in the rest of the draft

articles by specific provisions. With regard to the second condition, it deserved to be studied in the light of the development of international law and of the possibilities henceforth available to individuals who had sustained an injury. The Commission should therefore concern itself with the question whether recourse to a non-national jurisdiction accessible to all could or could not be considered a "domestic remedy", even if a purely literal interpretation did not allow that question to be answered in the affirmative.

107. The actual drafting of paragraph 1 was problematic. The word "action" seemed ambiguous and disputable. Diplomatic protection was not an action as such. It was the setting in motion of a process by which the claim of natural or legal person was transformed into a legal relationship between two States. That was one of the methods of entailing the responsibility of the State to which the injury was attributable. Furthermore, the question arose as to what was meant by "internationally wrongful omission", a term hitherto unknown in international law. Paragraph 2, which stated as a principle that diplomatic protection could, in certain "exceptional circumstances", be extended to non-nationals, raised serious difficulties. Quite apart from the fact that it was premature to deal with that very controversial question in article 1, what the Special Rapporteur was really proposing — diplomatic protection for refugees and stateless persons — was absolutely unsupported by State practice and was even contrary to certain international conventions, as would be seen when the time came to consider article 8.

108. Article 2 was not acceptable. It set forth the principle that the threat or use of force was prohibited as a means of diplomatic protection, except in certain cases listed by the Special Rapporteur. Those provisions helped to explain why the Special Rapporteur had used the word "action" in article 1. However, in so doing, he appeared to be mistaken. Diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or property of a national who had suffered injury in another State. That procedure had absolutely nothing to do with the question of the use of force. His delegation therefore believed that article 2 should be deleted.

109. The consideration of article 3 had given rise to a discussion within the Commission on who possessed the right exercised through diplomatic protection. According to the traditional view, it was the State that asserted its own right by taking up the cause of its national. On the other hand, according to another approach, the State was merely the representative of its national, who was the possessor of an interest that was legally protected at the international level. His delegation believed that the first concept should be retained. The State had discretionary competence in the matter. Contrary to what some members of the Commission had suggested, it would not be appropriate to "confine" that discretionary power. Diplomatic protection was a sovereign prerogative of the State as a subject of international law. Its exercise was therefore a right of the State. Furthermore, in order to exercise that right in any specific case, the State took into account not only the interest of its national who had been injured by a wrongful act of another State, but also a certain number of elements related to the conduct of foreign policy. It should therefore be left to the State to determine when to exercise diplomatic protection. For the foregoing reasons, his delegation had serious reservations about article 4, which stated as a principle that, in certain circumstances and "if the injury results from a grave breach of a *jus cogens* norm", the State had "a legal duty" to exercise diplomatic protection. In his delegation's opinion, the national of a State who suffered an injury abroad could not claim any right to diplomatic protection. The State was not bound by an obligation. An article of that nature, which was a proposal *de lege ferenda*, was not supported by State practice. That article, like others, reflected the overriding influence of what could be called a "human rights logic" and his delegation seriously doubted whether it was appropriate for the Commission to include that type of logic in its study.

110. According to article 5, the State of nationality was the State whose nationality the individual sought to be protected had "acquired by birth, descent or by bona fide naturalization". The actual principle on which that article was based posed some problems. The Commission was not considering the acquisition of nationality, but rather diplomatic protection, which could only be exercised on behalf of a national. What was under consideration was not so much the circumstances in which a State could grant nationality, a matter that depended on internal law, but rather the right of a State to protect one of its nationals. His delegation considered that it would be inappropriate for the Commission to try, in the context of its study, to define the nationality link of natural or legal persons or the conditions for granting nationality. However, it

would be useful for it to try to define the conditions for opposability of nationality vis-à-vis another State in the context of diplomatic protection. The International Court of Justice had already considered that question in 1955, but had done so in a very general manner and there was no consensus concerning that jurisprudence.

111. Article 6 also posed certain problems. It stated the principle that the State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national. The principle set forth in the article was in obvious contradiction with the one embodied in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, according to which "a State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". His delegation thought it would be preferable for the Commission to restrict itself to the principle established in that article, which, as far as his delegation knew, had never been questioned.

112. Article 8 stated the principle that a State could exercise diplomatic protection in respect of an injured person who was stateless and/or a refugee when that person was ordinarily a legal resident of the claimant State. That article which was, once again, clearly an exercise in the progressive development of international law, was not supported by State practice. It even appeared to be in contradiction with certain provisions of the annex to the 1951 Geneva Convention on the Status of Refugees, which made it clear that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, nor did it confer on those authorities the right of protection. As for the 1961 Convention on the Reduction of Statelessness, it made no mention of the issue of protection.

113. In the opinion of his delegation, it would be advisable for the Special Rapporteur to examine State practice in that area. In general, the Commission's work on diplomatic protection should be limited to codifying State practice and therefore to customary law. Furthermore, his delegation regretted that the informal consultation group set up by the Commission had decided that the draft articles would not deal with functional protection. It would have been rather useful for the Commission to cover that issue in its study since, by its very principle, it was comparable to the protection exercised by States on behalf of their nationals.

114. Concerning unilateral acts of States, he noted with satisfaction that unilateral acts of international organizations had been excluded from the study; as his delegation had stated the previous year, such a topic merited special consideration by the Commission.

115. As for the draft articles themselves, his delegation welcomed the deletion of former article 1; as it had stated the previous year, the drafting of that article raised many difficulties, as it covered only legal acts, even though political acts likewise could produce legal effects, and disregarded the intention of the author of the act — a particularly fundamental element — simply emphasizing instead the consequences of the act. It seemed impossible to embark on the task of drafting rules of international law applicable to unilateral acts of States if those acts were not well defined in the first place. In that regard, the definition of a unilateral act as contained in the third report of the Special Rapporteur — new article 1 — was preferable to that of the previous year, as it clearly stressed the intention of the State in formulating the act. As shown by the International Court of Justice in the *Nuclear Tests* cases, that intention was as critical to the characterization of the act as to the production of its legal effects. The term "autonomous" no longer appeared in the new definition. Nevertheless, it was essential to understand that, in order to be characterized as such, a unilateral act should generate autonomous legal effects. In other words, it should be independent of any manifestation of will on the part of another subject of international law. Autonomy was an important criterion in determining the strictly unilateral character of the act. However, if the study undertaken by the Commission covered only unilateral acts which were unrelated to pre-existing customary or conventional rules, the topic might lose much of its relevance. Although his delegation had stated during the consideration of the first report that it concurred with the Commission's approach of excluding unilateral acts which clearly fell under treaty law, it did not believe that unilateral acts which could enhance implementation of existing rules should be excluded.

116. The reference in the current wording to knowledge of the unilateral act by the addressee, whether a State or international organization, seemed appropriate. Nonetheless, it would be useful to consider, in the light of State practice, the manner in

which the act could be made known to the addressee. Replacement of the phrase "acquiring legal obligations" by "producing legal effects" was also a move in the right direction, as unilateral acts not only created legal obligations, but could also be a means of retaining rights and sometimes even of acquiring them.

117. The two paragraphs which constituted new article 3 concerning persons authorized to formulate unilateral acts on behalf of the State posed no particular problems, subject to an examination of State practice in regard to paragraph 2. He welcomed the deletion of former article 4, paragraph 3, which laid down as a principle that "heads of diplomatic missions to the accrediting State and the representatives accredited by that State to an international conference or to an international organization or one of its organs" could also formulate unilateral acts on behalf of the State. He continued to believe that such persons could not be deemed to be in a position to bind unilaterally the State which they represented at the international level, unless they had been specifically authorized for that purpose. There again it would be necessary to examine State practice. In that regard, wording derived directly from article 7, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, as some had suggested, did not appear to offer the most appropriate solution in the case in question.

118. Article 4 provided that a unilateral act formulated by a person who was not authorized under article 3 to act on behalf of a State was "without legal effect unless expressly confirmed by that State". The principle thus laid down was acceptable. In regard to silence, a question which had been discussed by the Commission during its consideration of article 4, it could not be likened to a unilateral act because it could not be regarded as an unequivocal manifestation of will. Its deletion was therefore to be welcomed. As for article 5, concerning the invalidity of unilateral acts, the approach of taking the rules applicable to treaty acts and applying them as they stood to unilateral acts was somewhat risky. Once again, what counted in dealing with the topic of unilateral acts was State practice. The Working Group should therefore give further consideration to the conditions for the validity and invalidity of unilateral acts.

119. In conclusion, he saw no reason why the draft articles should not be structured around the distinction between general rules applicable to all unilateral acts and specific rules applicable to specific categories of unilateral acts. He also saw no reason why, as part of the study on specific categories of unilateral acts, the Special Rapporteur should not first concentrate on acts which created legal obligations for the author State.

The meeting rose at 6 p.m.

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Chairman: Mr. Politi .... (Italy)
later: Mr. Vasquez (Vice-Chairman) .... (Ecuador)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Klisović** (Croatia), speaking on unilateral acts of States, said that, although simply transposing the rules of the 1969 Vienna Convention on the Law of Treaties to all categories of unilateral acts would be inappropriate, the invalidity of unilateral acts was one area where the application of the Vienna rules mutatis mutandis was acceptable. The Vienna rules on invalidity of treaties were based on the consensual character of the legal situation created by a treaty and consequently addressed defects in the expression of the true will of the parties (error, fraud, corruption, coercion, threat or use of force in violation of the Charter of the United Nations). Those causes of invalidity of treaties were applicable to unilateral acts as well and were appropriately included in draft article 5.

2. Another important aspect of the validity of unilateral acts had to do with whether a State could dispose of rights and obligations if in so doing it affected the rights or obligations of third States without their consent. Even if there were no defects in the expression of a State's true will, its intention to produce legal effects might fail because that State did not have the right to act unilaterally in a given situation. Such a situation might arise, for example, following the dissolution of a State into several new States. Pending definitive settlement of succession issues, the right to dispose, for instance, of the property and archives of the predecessor State would depend on the mutual agreement of all successor States, and any unilateral act aimed at acquiring or renouncing any right or obligation relating to the succession or claiming continuity from the predecessor State should be regarded as invalid. A provision should therefore be included in the draft articles regarding the incapacity of a State to formulate a unilateral act negatively affecting the rights of third States without their consent.

3. **Mr. Perez Giralda** (Spain), speaking on diplomatic protection, said that the concept had a solid basis in customary international law, and the Commission had sufficient State practice on which to draw in codifying the topic. His delegation shared the view that diplomatic protection in its traditional form, although premised on a fiction, was a useful instrument for the peaceful settlement of disputes between States regarding violations of international law affecting their nationals and served as a valuable complement to the existing fragmented system of human rights protection.

4. His delegation therefore supported the Commission's decision to eliminate article 4 of the draft articles proposed by the Special Rapporteur, which stipulated that the State of nationality of the injured person had a duty, albeit limited, to exercise diplomatic protection on that person's behalf. Diplomatic protection should continue to be conceptualized as a right rather than a duty of the State. Although that right derived from a prior violation by another State of the rights or interests of individuals, the distinction, artificial though it might be, between the right of the State and the right of the individual should be maintained. Even States that had, in their domestic legislation, accorded their nationals the right to diplomatic protection reserved the right to withhold it when the vital interests of the State were involved. Domestic laws providing for compensation to individuals in such cases were not in contradiction with the discretionary nature of the State's right to exercise diplomatic protection at the international level.

5. His delegation also supported the decision to delete draft article 2 as proposed by the Special Rapporteur, which provided for the exceptional use of force as a means of diplomatic protection. Diplomatic protection should be viewed as the initiation of a procedure for the peaceful settlement of a dispute. Article 2, paragraph 4, of the Charter of the United Nations was categorical in rejecting the threat or use of force, and no exceptions should be formulated that might cast doubt on that basic principle of international law.

6. His delegation considered the Special Rapporteur's proposed articles 5 and 7 to be sound. It also viewed with interest the progressive development of law represented by article 8, on the understanding that diplomatic protection of stateless persons and refugees was conceived as being at the discretion of the State and not as the right of the individual, and it supported the clause whereby such protection could not be exercised unless the injury had occurred after the person had obtained legal status in the State of residence.

7. The proposed article 6, on the other hand, lacked justification in State practice. To break with the principle contained in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, whereby a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed, would cause more problems than it would solve.

8. The topic of unilateral acts of States was as important as it was difficult. Some of the difficulties were theoretical, since the concept covered a diversity of acts that could not easily be addressed by a single set of rules. His delegation therefore supported the suggestion that a distinction should be drawn between general rules applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts.

9. Practical difficulties arose from the need to base the work of the Commission on State practice. State practice on unilateral acts was far from abundant, and in many cases the binding nature of the act was disputed. Moreover, most constitutions were silent on the domestic requirements for unilateral assumption of legal obligations, in contrast to the full regulation given to competence to enter into treaties. The cases mentioned involving forgiveness of debt were exceptional.

10. With regard to the use of the Vienna Convention on the Law of Treaties as a reference for elaborating rules on unilateral acts, his delegation agreed with the flexible approach taken by the Special Rapporteur. Although not all the rules of the Convention were applicable, some were, since treaties and unilateral acts both fell into the category of legal acts.

11. His delegation felt that the definition of a unilateral act was taking shape. The omission of the word "autonomous" should not, however, cause the Committee to lose sight of the need to restrict the scope of the draft articles as much as possible at the current stage and to set aside consideration of silence, acquiescence, estoppel or acts derived from treaties or customary law for the time being. His delegation still had problems with the use of the term "unequivocal" in draft article 1 to qualify "expression of will". It seemed self-evident that any act producing legal effects must be clearly expressed to avoid disputes about interpretation. The key term in the definition of unilateral acts was rather "intention", and, if anything, it was the intention that must be unequivocal. Deletion of the requirement of "publicity" from the definition seemed appropriate, but his delegation preferred an earlier rendering that required that the act should not be simply known but notified or otherwise made known to the State concerned.

12. Draft article 5 constituted a good provisional basis for developing rules about the causes of invalidity, which should be related to the rules defining the conditions of validity of unilateral acts. His delegation shared the interest in seeing a distinction drawn between relative and absolute (or *ex lege*) invalidity. Paragraph 7 of the article should be expanded to make the rule contained in Article 103 of the Charter of the United Nations applicable to unilateral acts, so that obligations under the Charter would prevail over any other obligations, whether assumed by treaty or by unilateral act.

13. **Mr. Leanza** (Italy) said that one of the most controversial points relating to the topic of diplomatic protection was its relationship to human rights protection. It was accepted that a State had the right to ensure that its nationals were treated in accordance with international standards and human rights norms. As a condition for the exercise of diplomatic protection, the individual must have suffered an injury and been unable to obtain satisfaction through local remedies. On the other hand, in the case of gross violations of human rights guaranteed by *erga omnes* norms, other members of the international community were also entitled to act, and that was the justification for paragraph 2 of draft article 1.

14. With regard to draft article 1, paragraph 1, his delegation supported the decision to omit reference to denial of justice, since the issue would involve consideration of primary rules. The question could be revisited in relation to the rule of exhaustion of local remedies. Of the three definitions of diplomatic protection proposed by the Commission, his delegation preferred Option One, which made it clear that the State was exercising its own right rather than the rights of the individual.

15. In draft articles 2 and 4, no clear distinction was made between a State's exercise of diplomatic protection to protect the individual interests of its nationals and its interventions to ensure their survival. Draft article 2 should state explicitly that the use of

force by a State in the protection of its nationals should be limited to highly exceptional circumstances in which their lives were in immediate danger.

16. Draft article 3, like draft article 1, reflected international practice in identifying diplomatic protection as a right of the State and not of the individual — correctly, in his opinion. The system of diplomatic protection and the system of international human rights protection should remain distinct and function side by side, although they might occasionally overlap. The discretionary power of the State to exercise its right was established in customary law and should not in principle preclude the possibility of enacting internal legislation making it an obligation of the State. Since the definition in draft article 1 had already mentioned that the injury to the person must have been caused by an internationally wrongful act, the international nature of the wrongful act was implicit in draft article 3 and did not have to be expressly stated.

17. With respect to draft article 5, international jurisprudence and State practice clearly indicated the importance of determining nationality based on the evidence of an effective or genuine link together with such criteria as birth, descent or bona fide naturalization. His delegation did not think that habitual residence should be adopted as a condition for the exercise of diplomatic protection. His delegation viewed favourably draft articles 6, 7 and 8, even though they reflected tendencies that had not yet acquired the status of customary rules of international law.

18. In approaching the topic of unilateral acts, it was important to avoid analogies with domestic law that might be misleading. The Vienna Convention on the Law of Treaties might be taken as a source of inspiration, bearing in mind that treaties and unilateral acts were two species of the same genus of legal acts, though with different characteristics and rules. His delegation would prefer to see the draft articles divided into two parts, the first devoted to rules common to all unilateral acts and the second addressing the rules applicable to the different categories of unilateral acts. Work on the topic should be limited to unilateral acts of States and should not be extended to other subjects of international law such as international organizations.

19. His delegation welcomed the new definition of unilateral act contained in draft article 1, particularly the replacement of the word "declaration" by the much less ambiguous word "act". The insertion of the phrase "intention of producing legal effects" and the replacement of the assumption of public formulation of the act with the proviso that it must be known to the State or international organization to which it was addressed constituted major improvements. The suggestion that the distinction between unilateral acts which depended on a treaty and unilateral acts in the strict sense should be made in the commentary was a good one, but it was not desirable to delete the adjective "autonomous", which was of fundamental importance in limiting the scope of the draft articles.

20. Article 3, paragraph 1, failed to cover situations in which a unilateral act was formulated by a body of persons, such as parliament, the cabinet or other bodies that might be empowered by internal legislation to do so. On the other hand, the wording of paragraph 2 was appropriate in that it broadened the terms of reference to all State practice.

21. His delegation supported the current wording of article 4 on subsequent confirmation of a unilateral act formulated without authorization, except for the word "expressly", since an act could be confirmed *per concludentiam* when the State did not invoke the lack of authorization as grounds for invalidity.

22. His delegation supported the decision to delete former draft article 6 on the expression of consent, since silence could not be regarded as a unilateral act in the strict sense. The new draft article 5 represented a significant improvement on the treatment of invalidity of unilateral acts, particularly with the addition of conflict with a decision of the Security Council as a cause of invalidity.

23. **Ms. Burnett** (United Kingdom) said, with regard to the topic of diplomatic protection, that it was important for the Commission's work to focus on the practical issues that might arise and to be firmly rooted in State practice. Her delegation shared the view, on which there seemed to be a large measure of agreement within the Commission, that questions of the use of force did not properly form part of the topic. It was therefore right that draft article 2 should be left to one side. In that connection, further attention could usefully be given to clarifying the scope of the draft articles, a matter dealt with in article 1. Her delegation also shared the predominating view that the exercise of diplomatic protection was a discretionary right of the

State. It could therefore not support the proposition in draft article 4, explicitly made *de lege ferenda*, that there should be a "duty" on States, at the level of international law, to exercise diplomatic protection in certain circumstances. Her delegation would, in advance of the Commission's next session, provide written comments on the six specific questions on which the Commission had sought guidance from States.

24. With regard to unilateral acts of States, while welcoming the suggestion that a more focused approach should be taken, she noted that the replies of States to the Commission's questionnaire had been very sparse. Several Governments, including her own, had expressed doubts as to whether the attempt to subject unilateral acts to a single body of rules was well-founded or even helpful. The Commission should give consideration to the future of the whole topic.

25. Pending written comments on reservations to treaties, she doubted whether the results of the work done so far could culminate in a guide of a "practical nature". Such a guide would be welcome, but the proposed guidelines seemed over-elaborate. Several were either redundant or even in danger of adding to the confusion often surrounding the topic. It was, for example, doubtful whether there was a place for "interpretative declarations" or so-called "conditional interpretative declarations" in a practical guide on reservations. The Special Rapporteur's intention to deal with the core issues — the permissibility of reservations and the legal effect of objections, which had been identified from the outset as the two main problems — was welcome.

26. The analysis of some of the most difficult conceptual issues in the Special Rapporteur's report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) was illuminating and helpful. The changes he had recommended were an improvement. Her delegation also endorsed the Commission's decision to shorten the cumbersome title of the topic; the new title should be more focused, reflecting its actual content. It might well be right to omit the reference to "hazardous activities", but the title should not be so truncated that it failed to convey a proper idea of the subject matter. Further thought should be given to finding a succinct way of capturing, in the title, the type of harm or risk concerned.

27. Her delegation would be ready to concur with the Commission's suggestion that the final instrument should take the form of a framework convention, if that met with general acceptance, but in that case it would suggest some modest adaptation of the text to reflect its status. To be meaningful, the instrument should stimulate the conclusion of more specific bilateral or regional agreements and national commitments and should accommodate existing ones. Although it would be unwise to attempt to define all the activities covered by the convention, article 1 could usefully set out a minimum list. It could also provide for States to designate additional activities to be covered, either on a unilateral basis or by agreement with neighbouring States.

28. Her delegation supported the view that the expression "not prohibited by international law" should be deleted from the definition of the scope of the draft convention in article 1, on the basis that the draft convention should apply to any activity involving risk, irrespective of whether it was contrary to any other rule of international law. If such an activity were to contravene other legal obligations, the consequences would follow in the normal way, as draft article 18 showed.

29. It was disappointing that the revised text did not take greater account of the well-recognized principles that precautionary action should be taken, that the polluter should pay and that development should be sustainable. Her delegation hoped that the final draft would reflect those principles explicitly in the text, particularly since they should underlie the process of equitable balancing of interests required by articles 10 and 11. The essence of precautionary action was that in certain circumstances protective measures should be taken in the absence of complete scientific proof of a causal connection between an activity and the harm that was occurring or was anticipated, yet that concept was lacking in draft articles on prevention and prior authorization. The two new articles 16 and 17, on emergency preparedness and notification of an emergency, were useful additions to the draft.

30. **Mr. Guan** Jian (China) said that the topic of diplomatic protection involved a series of complex theoretical and practical questions and had a bearing on inter-State relations. So long as the State remained the dominant actor in international relations, diplomatic protection would, despite the increased efforts by the international community to protect human rights,

continue to be the most important remedy for protecting aliens' rights. In terms of international law, it was a matter of inter-State relations, in that it redressed injuries suffered by nationals of a State as a result of acts committed by another State in violation of international law. A State was entitled to protect the legitimate rights and interests of its nationals abroad, but diplomatic protection was a right belonging to the State, not to its nationals. Whether and how it should be exercised in a specific case fell within the State's discretion. In order to prevent power politics and the abuse of diplomatic protection, therefore, the right to diplomatic protection should be limited. In particular, the use or threat of force in exercising such a right should be prohibited.

31. With regard to the specific issues on which the Commission had asked for comments, his delegation believed that diplomatic protection could be exercised only when the State extending protection could prove that the person concerned was its national. That prerequisite was clear-cut in theory, but in practice its application was complicated by the fact that a person might possess two or more nationalities or be stateless. In the former case, it could be asked which of the States of nationality was entitled to put forward a claim against a third State and whether one State of nationality could put forward a claim against another State of nationality. On the first question, his delegation considered that, in the light of State practice and the relevant provisions of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, a person having two or more nationalities might be regarded as its national by each of the States of nationality. They were therefore both entitled to claim on his or her behalf against the injuring State and the latter was not entitled to play off one State against the other. With regard to the question whether a State of nationality could put forward a claim against another State of nationality, the answer was in the negative, unless otherwise agreed. As far as stateless persons were concerned, traditionally States could not espouse a claim on their behalf. It might, however, be permissible to do so if the State where the person was a lawful resident was willing to provide diplomatic protection.

32. Because the Commission had concentrated on the draft articles on State responsibility, it had lacked time at its fifty-second session to consider the topic of diplomatic protection, which would in turn affect its plan to complete the first reading before the end of the current quinquennium. His delegation had no objection to giving priority to the draft articles on State responsibility, but hoped that once its second reading was finished, the Commission would give priority to the topic of diplomatic protection, with a view to completing its first reading within two or three years.

33. **Mr. Manongi** (United Republic of Tanzania), referring to the topic of diplomatic protection, said that his delegation endorsed the statement by the representative of South Africa, speaking on behalf of the Southern African Development Community, which had emphasized the need to make it clear that there was no duty on the State of residence to exercise diplomatic protection on behalf of refugees, since that might deter States from providing asylum to refugees or stateless persons. That view should be reinforced. His delegation believed, in common with the Commission, that the question whether a State should be permitted to extend diplomatic protection to a refugee should be treated with caution because of the inherent tension in any effort to broaden the nature and scope of diplomatic protection. The fact that diplomatic protection was a right that only a State could exercise, at its own discretion, should be recognized. The suggestion that it should be available to refugees was based on the international human rights regime, which granted recognition to individuals on the basis of their personhood, rather than their national affiliation. That represented a shift in the criteria applied; eventually the logic of personhood could supersede the logic of nationality as the basis for diplomatic protection. It was doubtful whether that was a desirable outcome.

34. The Special Rapporteur had excluded consideration of the notion that international organizations mandated to protect the welfare of refugees should provide protection, although that option offered an attractive solution to the potential disincentive that draft article 8 currently posed to States hosting large refugee populations. It was a matter of particular concern that the wording of the draft article established habitual residence as a basis for a request for diplomatic protection rather than the traditional criterion of nationality. That could add to the heavy burden already borne by refugee-hosting countries such as his own. It would therefore be preferable to extend the classic "functional" concept whereby international organizations had extended protection to their employees and, in the case of the

United Nations High Commissioner for Refugees, to refugees. The expression "when that person is ordinarily a legal resident", in relation to a stateless person or refugee, in draft article 8 also required clarification. In instances where refugees entered a country as part of an influx and not in an orderly fashion and were then permitted to remain over an extended period of time, the question of the legality of their residence required further elaboration. Lastly, it was apparent from some of the replies by States that there was a potential confusion between diplomatic protection and the law of immunities and privileges. The Commission should clarify the matter in its commentary.

35. **Mr. Rotkirch** (Finland), speaking on behalf of the Nordic countries, said that the topic of unilateral acts of States was challenging, since, in view of the vast array of possible unilateral acts, delimitation of the topic — and the definition of unilateral acts — would be crucial to the success of the undertaking. Of special interest for a codification project were those unilateral acts which produced legal effects in international law. It was, however, doubtful whether the intention of the author State, although highly relevant, should be seen as the sole or fundamental criterion; a unilateral act was binding not only to the extent that such was the intention of the author State but also inasmuch as it created legitimate expectations. The Commission should therefore consider how the principle of good faith should be reflected in the determination of the legal effects of unilateral acts. Although the issue would largely belong to the future Part Two, a reconsideration of draft article 1 might also be necessary. The same applied to some of the questions addressed in former article 6, which had been deleted, such as the effects of acquiescence in some situations and the question of estoppel. The proposed articles 2, 3, 4 and 5 raised no particular problems from the point of view of the delimitation of the topic, dealing as they did with questions that were arguably relevant to all unilateral acts.

36. In response to the Commission's request for suggestions as to the direction of further work, he said that, first, the Nordic countries did not fully agree with the suggested categories of unilateral acts that should be considered, which they found somewhat reductive. The Commission should bear in mind the importance of the context, as well as the interplay between the unilateral act and the legitimate expectations it might create. Secondly, they welcomed the suggestion that the draft should be structured around a distinction between general rules, applicable to all unilateral acts, and specific rules applicable to individual categories of unilateral act. The Commission should also move fairly soon to the specific rules, which might provide a more fruitful starting point for the discussion on the legal effects of unilateral acts than the general rules. Thirdly, there was merit in the suggestion that the study of specific categories of unilateral act should begin by concentrating on those acts which created obligations for the author State, although it was questionable whether that category should be limited to promises.

37. Knowledge of State practice was undoubtedly of great importance for the success of the study, but renewing the appeal to Governments to reply to the questionnaire might not be fruitful. It was evident from the replies received that the formulation of some questions was excessively general, or even obscure, which made it difficult for Governments to reply. Generally, the Commission should guard against an overambitious approach: there was no need for a comprehensive set of rules. A few general rules, together with a study of certain specific situations, could be sufficient. A study to that end could be conducted within a reasonably short time and still make a useful contribution to the understanding of the role of unilateral acts in international law.

38. **Mr. Geete** (India) concurred with those members of the Commission who preferred to deal with the topic of diplomatic protection without any special reference to human rights. While sharing the Special Rapporteur's enthusiasm for the promotion and protection of human rights insofar as their cause could be served through the appropriate use of diplomatic protection, his delegation did not believe it either necessary or desirable to change the very basis of diplomatic protection to serve the broader interests of individual human rights. The Commission's work should be limited to existing precedents and practice. Moreover, a State's action in pursuance of diplomatic protection for its nationals should be limited to representation, negotiation or even judicial proceedings. It should not include reprisals, retortion, severance of diplomatic relations or economic sanctions. The protection of human rights under *erga omnes* obligations was also not a proper part of the topic of diplomatic protection. In such cases, a State's right to intervene was subject to the general law on

State responsibility, which was under separate consideration and in any case was concerned with the broader issue of ensuring respect for obligations owed to the entire international community. It was a different matter altogether and should not be confused with the topic of diplomatic protection.

39. Diplomatic protection was also fundamentally incompatible with the right to use force in defence of rights of nationals. The two concepts could not coexist and could not even be integrated. Force was generally used as a last resort and even then its use would need to be judged against the general prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations. Its inclusion in articles on diplomatic protection would raise complicated questions and was better avoided. His delegation supported the Commission's decision to delete draft article 2 on the question originally proposed by the Special Rapporteur.

40. With regard to the question addressed in draft article 3, his delegation shared the view that, although the right of diplomatic protection belonged essentially to the State, to be exercised at its discretion, it should serve the interests of nationals as far as possible. Concern for the rights of the individual should not, however, be stretched to the point where it was obligatory for the State of nationality to espouse the claim in question despite political or other sensitivities. The Commission's decision not to include draft article 4, on the mandatory obligation of the State of nationality, was therefore welcome. The cross-reference to the concept in draft article 3 would presumably also be deleted.

41. With regard to draft article 5, his delegation agreed that the State's right to espouse the claims of its national should not be open to question, as long as the nationality granted had the proper basis, such as birth, descent or naturalization.

42. With regard to draft article 6, his delegation believed that as long as the individual concerned had suffered injury within the territory of the State of which he or she was a national, there was no scope for the exercise of diplomatic protection by any State, including the State of dominant or effective nationality. Any problems suffered by individuals in that regard were the natural consequences of the benefits which they would otherwise enjoy from holding dual or multiple nationality.

43. As to draft article 7, while there was no objection in principle to multiple sponsorship of a diplomatic claim irrespective of the principle of dominant or effective nationality, his delegation believed that it was necessary to guard against excessive international pressure being put on a State on account of injury suffered by a foreign national within its territory.

44. Draft article 8 was controversial. Neither the 1951 Convention relating to the Status of Refugees nor the 1961 Convention on the Reduction of Statelessness required the State providing refuge to exercise protection on behalf of stateless persons and refugees. It was difficult to envisage the circumstances under which such protection must be exercised. Surely it could not be exercised against the State of nationality. In respect of the exercise of such protection against a third State, the continued treatment of the individual as a refugee in the territory in which the injury was suffered would presumably prevent the State of habitual residence from taking up the claims involved. It might be useful to compile data concerning actual situations in which refugees would require diplomatic protection from such States over and above the functions of the United Nations High Commissioner for Refugees.

45. Turning to the topic of unilateral acts of States, he said that the legal effects of unilateral acts as a source of international law was an eminently fit subject for study. The important question was whether any uniform or common features could be identified from the different types of unilateral acts that occurred from time to time in State practice. The conclusions drawn by the Special Rapporteur so far were based on the survey of the existing literature. However, as that was not sufficient to clear many of the remaining doubts, the Commission had chosen to seek information from Governments through a questionnaire. It was necessary to wait for their responses before the available evidence on State practice could be assessed properly.

46. It was also necessary to see how many States would allow international obligations to be incurred on the basis of oral unilateral acts, including silence, as opposed to acquiescence, or by way of estoppel, which involved a certain type of conduct. The Special Rapporteur himself had identified acquiescence and estoppel as outside the scope of his study. The Indian delegation supported the position taken by the Special Rapporteur that the provisions of the Vienna Convention on the Law of Treaties and its *travaux*

préparatoires could provide guidance in formulating the legal regime governing unilateral acts.

47. **Mr. Longva** (Norway), speaking on behalf of the Nordic countries, endorsed the Commission's view that the topic of diplomatic protection was ripe for codification and had great practical significance. In the view of the Nordic countries, it was important to focus on practical needs rather than theoretical debates. A desirable outcome would be a guide to practice.

48. The question of the use of force in the context of diplomatic protection was highly controversial. In the view of the Nordic countries, that question was not part of the topic of diplomatic protection. Any rule permitting or justifying the use of force in that context could easily prove dangerous. States should not be given a legal basis to use force other than in self-defence, as provided for in Article 51 of the Charter of the United Nations. The countries on whose behalf he spoke noted with satisfaction that draft article 2 had not won acceptance by the Commission.

49. Diplomatic protection was a sovereign prerogative of the State of nationality of the person concerned, who for all practical purposes, was to be considered as a beneficiary of international law. There was no obligation on the part of the State to present a claim on behalf of an injured national. The Nordic countries therefore welcomed the Commission's decision not to refer draft article 4 to the Drafting Committee.

50. Diplomatic protection was not recognized as a human right and could not be enforced as such. The Nordic countries shared the view that a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved. Any State had the right to act and might even have a duty to act when faced with human rights violations, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. However, diplomatic protection should not serve as the instrument for such action because it was not the rights and interests of nationals alone that were to be defended, but those of the international community as a whole.

51. **Mr. Kocetkov** (Bosnia and Herzegovina), referring to the topic of diplomatic protection, said that his delegation supported the deletion of draft article 2 concerning the threat or use of force in the exercise of diplomatic protection. It was clear that the use of force was not part of the topic of diplomatic protection and that its introduction would be unacceptable.

52. His delegation also supported the deletion of draft article 4. The proposal that the State of nationality had a legal duty to exercise diplomatic protection on behalf of an injured person upon request was not in conformity with customary international law, in accordance with which diplomatic protection was a discretionary right of the State and not of the individual.

53. With regard to draft article 5, his delegation believed that while diplomatic protection was closely linked to nationality, the issue of the acquisition of nationality did not fall within the scope of the topic.

54. His delegation was interested in dual or multiple nationality, which was a fact of international life, even if not all States recognized it. The 1997 European Convention on Nationality accepted multiple nationality on condition that the provisions relating to multiple nationality did not affect the rules of international law concerning diplomatic or consular protection by a State party in favour of one of its nationals who simultaneously possessed another nationality. Bearing in mind the consequences of mass migrations, the process of globalization and trends in the implementation of the policy of "open borders", the position of persons with dual or multiple nationality should be further elaborated in respect of diplomatic protection. It would be desirable to have a more precise definition of the distinction between an effective link and a weak link between a national and his/her State.

55. **Mr. Czaplinski** (Poland), referring to the topic of diplomatic protection, said, with regard to draft article 1, that Option One, proposed for consideration by the Drafting Committee on the basis of the Informal Consultations, appeared to be the best way of reflecting existing State practice. The replacement of the word "action" in paragraph 1, as suggested by the Special Rapporteur, by a more descriptive formula, such as "diplomatic action" or "judicial proceedings", also appeared to be justified. It was worth recalling that the Permanent Court of International Justice, in the *Mavrommatis Palestine Concessions* case, had stated that the proper way for a State to exercise diplomatic protection was by resorting to diplomatic action or international judicial proceedings.

56. Bearing in mind that the prohibition against the threat or use of force, as proclaimed in Article 2, paragraph 4, of the Charter of the United Nations, was one of the most important norms of contemporary international law, his delegation supported the Commission's rejection of the initial proposal by the Special Rapporteur in draft article 2 to recognize the possibility of resort to the threat or use of force as a means of diplomatic protection. The threat or use of force in the exercise of diplomatic protection could not be justified even if it could be characterized as self-defence. At the current stage of development of international law, the question of the use of force was not part of the topic of diplomatic protection and lay outside the Commission's mandate.

57. While recognizing the right of each State of nationality, as proclaimed by draft article 3, to exercise diplomatic protection on behalf of a national or even, in exceptional circumstances, of a non-national, unlawfully injured by another State, his delegation believed that that right should be treated as discretionary and not connected with an obligation to exercise it on the request of an injured national. Consequently, his delegation saw no reason for the retention of draft article 4, providing for such an obligation if the injury resulted from a grave breach of a *jus cogens* norm. Such a suggestion was in fact *de lege ferenda* and not based on the general practice of States.

58. With regard to draft articles 5 to 8, the Commission had formulated a series of questions to be answered by Governments. The first question was whether a State could exercise diplomatic protection on behalf of a national who had acquired nationality by birth, descent or bona fide naturalization where there was no effective link between the national and the State. His delegation believed that that question should generally be answered in the affirmative, especially where such a person did not simultaneously possess any other nationality. In such a case, any attempt to deprive the person of the possibility of enjoying the diplomatic protection of his/her State of nationality would be unjustified and would put that person in the position of statelessness. Except in the exceptional circumstances provided for in draft article 8, in no case should a link of habitual residence replace a link of nationality as a necessary connection between an injured person and a State entitled to exercise diplomatic protection on behalf of that person, especially when the nationality was obtained on the basis of birth, descent or bona fide naturalization. The problem became more complex, however, in situations of multiple nationality, as reflected in the Commission's questions (c) and (d) and in draft articles 6 and 7. The order of those two draft articles should be reversed, since draft article 7 contained a more general rule, while draft article 6 dealt with a specific situation of one State of nationality exercising diplomatic protection against another State of nationality of the same person.

59. With regard to the Commission's question (c), it seemed obvious that a State with which the national had an effective link could exercise diplomatic protection when that national was also a national of another State with which he or she had a weak link. No problems should be created by the exercise of such protection vis-à-vis any third State. There might, however, be some difficulties when diplomatic protection was exercised against another State of nationality. It should be recalled that article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws provided that a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed.

60. While the Special Rapporteur had cited many examples, mainly judicial decisions, in which the development and application of the principle of effective or dominant nationality in cases of multiple nationality had taken place, it appeared premature to state that the principle embodied in draft article 6 reflected the current position in customary international law which accorded legal protection to individuals even against the State of which they were nationals.

61. With regard to draft article 6, it should be stressed that the principle of effective or dominant nationality in cases of dual nationality might be applicable where diplomatic protection was exercised by one of the States of nationality against a third State. However, where it was applied to the exercise of diplomatic protection by one State of nationality against another such State, it appeared that there was still a lack of sufficient support in customary international law for such codification. Accordingly, his delegation believed that the Commission's question (d) should be answered in the affirmative, although it understood that on the basis of draft article 7 there might be competition with

another State of nationality wishing to exercise diplomatic protection.

62. His delegation answered the Commission's questions (e) and (f) in the affirmative. It supported draft article 8 concerning the exercise of diplomatic protection vis-à-vis stateless persons and refugees.

63. *Mr. Vasquez (Ecuador), Vice-Chairman, took the Chair.*

64. **Mr. Hilger** (Germany) said that article 2 of the draft articles on diplomatic protection touched upon a highly sensitive area. His country condemned any use of force in international politics. Exceptions could be permitted only on legitimate grounds recognized by international law. Diplomatic protection should be regarded as a procedure for the peaceful settlement of disputes between States, and therefore could not, in principle, serve as a legitimate ground for the use of force. Without ruling out any use of force in the context of diplomatic protection, he doubted whether a discussion of the use of force was warranted in that context.

65. Draft article 4 envisaged diplomatic protection as a right which the individual could invoke against his or her State. His country took the view that it was for States to decide whether to exercise diplomatic protection, and accordingly it was their right to provide it. The question whether a State should provide it was a matter of internal, not international law. Moreover, if it decided not to do so there was no violation of human rights. The attempt in draft article 4 to protect human rights was unnecessary. Human rights had not yet developed sufficiently in international law, through *opinio juris* and State practice, to warrant codification of an individual right to diplomatic protection.

66. Draft articles 5, 6 and 7 dealt with the problem of determining the effective or dominant nationality of individuals possessing dual or multiple nationality. He agreed in principle with the solutions adopted in those articles, especially the extension and development of the principle of effective or dominant nationality. However, an effective link with the claimant State must not become a condition for diplomatic protection, especially where an individual possessed only one nationality. Otherwise, such an individual would be deprived of the protection and be reduced to the level of a stateless person.

67. Turning to the topic of unilateral acts of States, he drew attention to Germany's reply to the Commission's questionnaire on the topic. In view of the great diversity of unilateral acts in State practice, he doubted whether the topic was suitable for codification. His delegation intended to comment on the discussion on the item following the Commission's next session.

68. **Mr. Rogachev** (Russian Federation) said that diplomatic protection was one of the oldest institutions in international law, and still among the most controversial. The difficulty for the Special Rapporteur, and for the Commission, in dealing with the topic was how to strike a proper balance between the codification of the general rules of international law in that area, and its progressive development in accordance with current trends. In formulating the draft articles, his delegation would recommend a conservative approach, to reflect the line taken by Governments. His own delegation took the view that diplomatic protection was extended only to nationals, and only through diplomatic or consular channels. The concept of diplomatic protection had to be correctly defined. Its scope was unduly restricted by the term "internationally wrongful act" used in draft article 1 for an act of a State giving rise to a right to diplomatic protection. It would be better to use the term "unlawful", as in draft article 3. The definition of diplomatic protection in draft article 1 should make clear that the protection in question comprised only the kind of protection offered by diplomatic and consular agents for the rights of nationals of the claimant State, which of itself meant that force could not be used. As for the beneficiaries of the protection, many modern constitutions, including that of the Russian Federation, gave parity to stateless persons along with nationals. However, their new status had not yet been reflected in international law. State practice was still based on the old rule that individuals without a nationality had no right to diplomatic protection because an injury done to them was not an injury to any State. That could not be regarded as an acceptable position in modern society, but nor should the issue be dealt with in the framework of diplomatic protection, which bore solely upon the legal relationships deriving from nationality. The absence in the draft articles of substantive provisions on protection for individuals who were not nationals did not mean that they could not enjoy the protection of their State of residence. He therefore supported the formulation of draft article 8, although, as the

Chairman of the Commission had pointed out, it placed an additional burden on States which took in refugees. Another difficulty lay in the traditional doctrine and practice of States, which was to treat the right to diplomatic protection as a right of States, whereas some modern constitutions attributed it to individuals.

69. Draft article 3 treated the right of the State to exercise diplomatic protection as a discretionary right. That was not really the case, since a State could not choose arbitrarily to exercise it on behalf of some nationals rather than others; it must protect all equally, and must also observe the fundamental principles of international law when deciding how to exercise it. Draft article 4, which was intended to clarify the obligation of a State to provide diplomatic protection, had actually confused the situation further by confining the obligation to grave breaches of norms of *jus cogens*. Such breaches gave rise to State responsibility, not to a duty to provide diplomatic protection, so paragraph 2 of draft article 4 became meaningless.

70. Draft article 5 paid too much attention to issues of nationality. He would prefer to reword it simply to read: "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual claiming diplomatic protection lawfully possesses".

71. Although the codification of the rules on diplomatic protection was in the initial stages and thus inevitably brought up a number of controversial issues, it was a thoroughly practical and worthwhile project.

72. **Mr. Choung** Il Chee (Republic of Korea), dealing first with the topic of State responsibility, said that on the whole, he could accept the formulation of draft article 22, which precluded the international wrongfulness of an act of a State if it constituted a lawful measure of self-defence taken in conformity with the Charter of the United Nations. However, Article 51 of the Charter required there to be an armed attack on the State before it could exercise the right of self-defence. It was not entirely clear whether the inherent right of self-defence could be exercised before an attack took place. As his delegation had previously suggested, the wording of draft article 22 could be changed to reflect the possibility of a State invoking its right of self-defence under customary international law, bearing in mind the declaration of the International Court of Justice, in the case between Nicaragua and the United States of America, that customary international law "continues to exist alongside treaty law".

73. Draft article 37, paragraph 2, required the compensation to "cover any financially assessable damage including loss of profits" but without including moral damage, although the earlier draft article 44 had made provision for "economically assessable damage" which according to the commentary included moral damage. If the new term "financially assessable damage" was intended to cover moral damage, that should be made clear in the text of draft article 37. To exclude moral damage would be inconsistent with international arbitral jurisprudence, which had established in the 1926 *Janes* case that claims for loss or damage "are sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages ... of indignity, grief and similar wrong".

74. He welcomed the inclusion in draft article 41 of obligations *erga omnes*, now set down in codified form. However, the wording of draft article 41 raised a number of questions, especially the nature of the "fundamental interests" of a State, the definition of a "gross or systematic failure", and the standard implied by the phrase "risking substantial harm". Similarly, in draft article 46, he wondered what kind of conduct by an injured State constituted valid acquiescence, and what time-frame was required for its claim to lapse. Draft article 49, paragraph 1 (a), referred to "the protection of a collective interest". The interest of a group of States might clash with the interests of the international community as a whole. The possibility of such a conflict should be avoided.

75. Draft article 53 involved an issue of fairness. The burden of calling upon the other State and offering to negotiate with it should be shifted from the injured to the injuring State.

76. Turning to the draft articles on diplomatic protection, he suggested inserting the words "short of use of force" in draft article 1, paragraph 1, after "diplomatic protection means action". The concept of diplomatic protection should not include the use of force as a method of settling international disputes. When a State used force to protect its nationals abroad, the grounds invoked were usually self-defence, self-help or "humanitarian intervention". However, the threat or use of force was no longer permissible, according to Articles 1 and 2 of the Charter of the

United Nations, its preamble and other relevant United Nations instruments. As it stood, draft article 2 might be invoked by strong Powers to impose their will on small or weak States. He therefore endorsed the observation of the Special Rapporteur that draft article 2 was not acceptable to the Commission. However, he supported the traditional approach adopted in draft article 3, whereby States had a discretionary right to exercise diplomatic protection on behalf of their nationals.

77. Draft article 4, paragraph 1, raised two issues: first, it provided that a State had a "legal duty", rather than a discretionary right, to extend diplomatic protection to its nationals abroad; and, second, it referred to *jus cogens*, which had not been clearly defined under international law. He therefore agreed that there was a need for more State practice and *opinio juris* before the issue could be considered by the Commission.

78. He was in favour of retaining reference to birth, descent or bona fide naturalization in draft article 5; whatever its merits, the decision of the International Court of Justice in the *Nottebohm* case had not abolished the traditional criteria for the determination of nationality.

79. In draft article 6, it would be preferable to employ the more widely-used term, "effective nationality". Furthermore, the draft article allowed States to extend diplomatic protection to persons with dual nationality; however, the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws established that a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. In any case, the Republic of Korea would not be affected by that provision since dual nationality was not permitted under its legislation.

80. With respect to draft article 8, he noted that a person who had become a legal resident could no longer be considered a refugee and could therefore claim diplomatic protection from the host State; if habitual residence was included among the criteria for nationality, habitual residents of the host State would also be eligible for diplomatic protection. However, it might be useful to add a statement that the United Nations High Commissioner for Refugees was authorized to protect stateless persons and refugees who lacked such social links. He also agreed with the suggestion that draft article 8 should be divided into two parts dealing with stateless persons and refugees, respectively.

81. Turning to the draft articles on unilateral acts of States, he suggested that the word "concerned" should be deleted from draft article 3, paragraph 2, in order to broaden the scope of that provision. Furthermore, the closely-related concepts of silence and acquiescence should have been grouped together; in both cases, where no act was involved, the absence of a reasonably expected protest constituted acceptance of a unilateral act. The Commission should also consider the doctrine of estoppel, which had become a part of international case law.

82. Draft article 5, paragraph 7, was consistent with Article 25 of the Charter of the United Nations, under which Members of the United Nations agreed in advance to carry out the decisions of the Security Council. However, he did not understand the purpose of paragraph 8, since States would not normally formulate unilateral acts that conflicted with a norm of fundamental importance to their domestic law, which he took to mean their Constitution; the issues raised by such incomprehensible behaviour should be resolved at the domestic level. The paragraph should therefore be reworded or deleted.

83. **Mr. Al-Baharna** (Bahrain) said he hoped that the Commission would complete its consideration of State responsibility by the end of the current quinquennium. To that end, the questions relating to responsibility for breaches of *ergo omnes* obligations and to original article 19 should be resolved and the question of countermeasures reconsidered in light of the views expressed by Governments. Furthermore, a compulsory dispute settlement regime would be necessary if, as he hoped, the draft articles were to be adopted as a convention.

84. Although Part Two and Part Two bis were closely related in subject matter, it would be preferable either to rename the latter Part Three or to divide Part Two into two sections on content and implementation, respectively.

85. He endorsed the decision to reformulate the draft articles from the perspective of the State incurring responsibility and to group all the general provisions together in Part Four and agreed with the suggestion that the draft articles should be expanded to cover all cases of State responsibility. He particularly welcomed

the revised provisions of Part Two, Chapter III; draft article 41 should provide an acceptable compromise that would put an end to the long-standing conflict on original article 19. However, in the interests of clarity, the words "of the international community as a whole" should be inserted after "interests" in draft article 41, paragraph 2.

86. Although draft article 42 made stronger provision for the consequences of serious breaches than had draft articles 51 and 53 of the version adopted on first reading, it failed to provide for satisfactory damages or reparation arising from aggression or genocide. It would be preferable to include a reference to Chapter VII of the Charter of the United Nations and to amend paragraph 3 to read: "This article is without prejudice to the consequences referred to in Chapter II of this Part and to such further consequences that the serious breaches may entail under international law".

87. Chapters I and II of Part Two bis represented a great improvement on the previous version; however, he suggested that several minor drafting changes should be made to draft article 43. He also expressed concern that the reference to provisional countermeasures in article 53, paragraph 3, might lead to abuse and proposed that the paragraph should be deleted.

88. Lastly, he suggested that the words "and principles" should be added after "rules" in draft article 56.

The meeting rose at 1 p.m.

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Chairman: Mr. Politi .... (Italy)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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The meeting was called to order at 10.15 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Becker** (Israel) said he strongly endorsed the position that States had full discretion in the exercise of diplomatic protection, which involved the evaluation of delicate matters relating to foreign policy and national interests. In general, he considered that a State could take up the claim of a bona fide national against a third State without having to show an effective link with that national; in that connection, he noted that the *Nottebohm* case did not address the general issue of the relationship between nationals and States. However, it might be necessary to set limits in order to prevent abuse in, inter alia, cases where nationality had been acquired in bad faith.

2. With respect to dual or multiple nationality, he endorsed the principle expressed in draft article 7 but agreed that the issue of coordination in the exercise of diplomatic protection between two or more States should be addressed in greater detail.

3. In principle, he supported the approach embodied in draft article 8. Nevertheless, additional restrictions might be needed since stateless persons and refugees were subject to different legal regimes involving specific obligations for States.

4. Turning to the draft articles on unilateral acts of States, he reiterated his view that an attempt to provide a strict legal definition of such acts would run counter to actual State practice. However, he recognized that there was general support for continued consideration of the topic. He therefore welcomed the proposal to study the various categories of unilateral acts and agreed that the initial focus should be on acts that created legal obligations for the author State. He also endorsed the principle that the acts in question were those whose legal effects were not predetermined by the law of treaties or customary law.

5. He welcomed the replacement of "declaration" with "act" and "obligations" with "legal effects" in draft article 1; he considered that unilateral acts entailed not only legal obligations but also the acquisition or maintenance of rights. However, he regretted the replacement of the phrase "publicly" by "and which is known to that State or international organization" which could suggest that a unilateral act would have legal effects even if its existence became known to the addressee State by indirect means. He therefore supported the proposal to add the words "which is made known by the author State" to the definition. Furthermore, he considered that the requirement that unilateral acts must conform to international law and, in particular, peremptory norms should be explicitly incorporated into draft article 1.

6. With respect to draft article 3, it should be specified that unilateral acts with binding international effect could be formulated not only by a head of State or Government or a minister for foreign affairs but, under certain circumstances, by other officials as well; the draft article should be amended to reflect the strict limitations applicable in such cases.

7. The wording of draft article 4 was preferable to that of previous versions; the current approach granted author States greater flexibility by allowing for subsequent confirmation of an act formulated by an unauthorized person.

8. Draft article 5, paragraph 7, was unnecessary. It was inappropriate to mention only conflict with a decision of the Security Council as grounds for the invalidity of a unilateral act; yet it would be counterproductive to present an exhaustive list of such grounds. The issue could better be dealt with by including the requirement of lawfulness in the definition of unilateral acts. (draft article 1).

9. Lastly, he urged the Committee to consider various issues not discussed in the reports of the Special Rapporteur, including the duration of validity of unilateral acts, the ability to revoke a unilateral act and the validity of conflicting unilateral acts formulated by different authorized representatives of a State.

10. **Mr. Janda** (Czech Republic) said that the draft articles on diplomatic protection raised a number of thought-provoking questions that went beyond the traditional approach to the topic and corresponded to modern developments in international law. In particular, he endorsed the Special Rapporteur's innovative treatment of diplomatic protection as an instrument for the protection of human rights. However, the relationship between the two topics must not be exaggerated; States might take action on behalf of their nationals in situations involving an internationally wrongful act that did not constitute a breach of human rights and, in any case, diplomatic

protection could be exercised on behalf of legal persons.

11. While the principle embodied in draft article 4 had merit, any conclusion must be based on State practice, since it was not always clear whether domestic legislation obliged the State to take action on behalf of its nationals or whether it merely gave nationals abroad the right to consular protection.

12. Although draft article 6 was fully in the spirit of the *Nottebohm* case and of current international jurisprudence, the underlying principle might cause problems of application. It was difficult to imagine a situation in which the dominancy of nationality of the claimant State was so indisputable that even the respondent State would not oppose its exercise of diplomatic protection. The statement that "any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State should be resolved in favour of the respondent State" (A/55/10, para. 474) was hardly satisfactory and, in fact, cast further doubt on the usefulness of the provision. He therefore looked forward to the results of the Commission's further work on the draft article.

13. With respect to draft article 8, he agreed with the Special Rapporteur that the absence of any clause on diplomatic protection in existing conventions on stateless persons and refugees was an oversight which should be remedied.

14. Lastly, he was concerned that the use of the adjective "diplomatic" to modify "protection" presupposed that such protection would always involve the provision of peaceful assistance to injured nationals. He therefore welcomed the Commission's decision not to deal with the use of force in connection with diplomatic protection in its future deliberations on the topic.

15. **Mr. Grasselli** (Slovenia) said that contemporary realities made it essential to consider the relationship between human rights and diplomatic protection, although the latter should be exercised only where international mechanisms were not available. However, traditional diplomatic protection had the advantage of providing an orderly administration of multiple claims, diplomatic channels for negotiation and settlement and State intervention in implementation of the law; individuals were not left to pursue claims on their own behalf.

16. He agreed with the previous Special Rapporteur that States might not resort to the use of force in the exercise of diplomatic protection. Article 51 of the Charter of the United Nations could not be used as a legal basis for armed intervention to protect nationals and, in light of past abuses and of modern erga omnes obligations, the issue could not be dealt with in the context of diplomatic protection, although it might be taken up in some other framework. It would therefore be advisable to insert a saving clause to that effect.

17. Draft article 4 was closely related to the question of whether individuals could pursue their own claims while simultaneously benefiting from diplomatic protection, an issue that required further consideration.

18. He questioned whether the same principles could be applied to natural persons or to legal persons in cases of dual nationality; in his opinion, the provisions of draft articles 5 to 8 should concern only the former. Implementation of the principle that all questions relating to the acquisition of a specific nationality should be governed by the State whose nationality was claimed should not extend beyond the point at which one State's legislation encroached upon the sovereignty of another State. Thus, draft article 6 should be amended to exclude cases where the injured national was a resident of the respondent State.

19. He welcomed the inclusion of refugees under draft article 8. Furthermore, a State should be entitled to exercise diplomatic protection where there was no effective link between the national and the State, provided that the national had no effective link with the respondent State. In principle, States were entitled to protect their nationals and should not be obliged to prove their right to do so except in the specific cases mentioned in draft articles 6 and 8. Similarly, in cases of dual nationality, both States were entitled to exercise diplomatic protection either jointly or separately against third States. In cases where the link to both States of nationality was weak and the person was a legal resident of the respondent State, the bona fide acquisition of nationality should be proved. As for other matters under the topic, he hoped that the Commission would address the protection of corporations and the continuance of nationality in the future.

20. He stressed the distinction between unilateral acts and treaties and welcomed the fact that questionnaires would again be sent to States; the 1969 Vienna

Convention on the Law of Treaties should not be considered decisive on the issue. He agreed that the acts in question were non-dependent and that their legal effects were not predetermined by conventional or customary law. For the time being, international transactions not contained in the law of treaties, such as estoppel, could be excluded from consideration.

21. Non-dependent acts could not be legally effective if there was no reaction on the part of other States; thus, a unilateral declaration on continuity in State succession did not produce legal effect unless it was accepted by other States.

22. It was too early to consider making a distinction between general rules applicable to all unilateral acts and specific rules applicable to individual categories of such acts. It would be best to concentrate first on unilateral acts which created obligations for the author State, although recent events suggested that a focus on acts that corresponded to a State's position on a specific situation or fact would facilitate the collection of information on State practice.

23. Draft articles 2 and 3 should be amended to reflect the fact that national parliaments were also authorized to formulate unilateral acts on behalf of the State. Furthermore, with respect to draft article 5, the Commission should deal with the validity of unilateral acts before considering the issue of their invalidity.

24. He welcomed the draft guidelines on reservations to treaties. In particular, he considered that the establishment of a 12-month time limit for objections to late reservations was well-founded. He also noted that the current version of the draft guidelines did not include mention of State succession, since all matters relating thereto would be dealt with in a separate chapter; he urged that article 20 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties should be taken into consideration in that context. In particular, there was no reason why late reservations should not be permitted within 12 months of a State's notification of succession.

25. In future, he hoped that the Commission would consider the issues of responsibility of international organizations, expulsion of aliens and shared natural resources of States.

26. **Mr. Lavalle Valdés** (Guatemala), speaking on unilateral acts of States, said that, despite an awareness of the difficulties of the topic, he did not share the view that it was not feasible to elaborate general rules applicable to unilateral acts, nor did he feel that the undeniable paucity of information on State practice was an insuperable obstacle. Moreover, he was not convinced that it would be necessary to divide the topic into general rules applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts. The only aspect of unilateral acts that seemed to call for specific rules concerned whether and how they could be revoked.

27. He did not believe that a purely material act could be a unilateral act within the scope of the draft articles and hence found the consistent use of the verb "formulate" to be appropriate. For the sake of clarity, a provision might be added stating that unilateral acts could be formulated orally or in writing. Nor could a unilateral act consist of mere abstention. It followed that silence could not be considered a unilateral act within the scope of the articles, although it might be advisable to discuss it in a future Part Two of the draft articles on the legal effects of acts.

28. To avoid confusion in cases where the formulation of the unilateral act implied but did not refer explicitly to certain legal effects, after the words "producing legal effects" in draft article 1 the phrase "or in a manner that necessarily implies the production of such effects" should be inserted between commas. The word "unequivocal" qualifying "expression of will" in the definition need not be construed as equivalent to "express". An implicit or tacit expression of will could be unequivocal. His delegation agreed with the editorial correction to the definition noted in the last sentence of paragraph 559 of the Commission's report (A/55/10).

29. It would be advisable to add a new article providing that the draft articles did not apply to dependent unilateral acts or, conversely, applied only to autonomous acts. Otherwise, it might be assumed that the draft articles covered unilateral acts that depended on a treaty, such as ratifications or reservations. The article, following the example of article 3 (b) of the Vienna Convention on the Law of Treaties, might provide that nothing prevented the provisions of the draft articles from applying to dependent unilateral acts.

30. Other articles of the Vienna Convention on the Law of Treaties that might, with some care and flexibility, be adapted to form new draft articles on

unilateral acts were articles 4, 27, 31, paragraphs 1, 39, 43, 45, 46, 61, 62, 63, 64, 65 and 69 to 72.

31. With respect to invalidity, it would be helpful to add a new article providing that a unilateral act was invalid or at any rate ineffective against States that were co-parties to a treaty with the State formulating the act, if the act was incompatible with the treaty and the States parties did not accept the act.

32. Referring briefly to a number of points, he said he agreed that the legislature could be the author of a unilateral act within the scope of the draft articles. He also agreed that the term "consent" in draft article 5, paragraph 1, was inappropriate, and he shared the doubts of others about the wisdom of article 5, paragraph 8. Lastly, he felt it might be useful to provide that unilateral acts, or some categories of them, should be registered pursuant to article 102 of the Charter of the United Nations.

33. **Mr. Sepúlveda** (Mexico) said that major changes had been made in the past four years on the draft articles on State responsibility, most of them positive, and the prospect of completing work in 2001 on a topic that had required over 50 years of strenuous efforts was highly encouraging. However, his delegation was seriously concerned about the decision to set aside the question of settlement of disputes. In a matter as important as State responsibility, the text would be incomplete and the efficacy and application of the principle of responsibility would be weakened without a dispute settlement mechanism.

34. The new approach taken to the distinction between the crimes and delicts of a State had helped to resolve the controversy over the former article 19 by referring to the concept of serious breaches of essential obligations to the international community as a whole and moving it to Part Two, which dealt with the consequences of breaches of multilateral obligations and implementation of State responsibility. Most importantly, the new article 49 entitled a State, whether or not it was itself the injured State, to invoke the responsibility of another State if the obligation breached was owed to a group of States including that State or to the international community as a whole.

35. The most controversial issue was the regime of countermeasures contained in the new article 54, whereby a State as identified in article 49 might take countermeasures at the request and on behalf of any State injured by the breach. The same article also provided for countermeasures, and possibly even collective countermeasures, in cases of serious breaches of essential obligations to the international community as a whole.

36. Determining whether such a serious breach had occurred appeared to be, in principle, a matter to be dealt with under Chapter VII of the Charter of the United Nations, and the response to such a breach was already provided for in the Charter. It was not appropriate to alter the principles of the Charter by allowing for collective countermeasures, undertaken unilaterally, without the involvement of the central body of the international community, leaving it up to the individual State to decide whether there had been a serious breach, what sort of countermeasure should be applied and under what circumstances they should be lifted. The latitude fostered by such a system was incompatible with the institutional system that had been created in 1945.

37. Countermeasures had been controversial from the outset. Although the new draft articles set strict conditions for the application of countermeasures, they nevertheless left considerable margin for arbitrary actions, all the more so since they had been divorced from dispute settlement mechanisms. The draft articles should accordingly be limited to establishing the consequences of an internationally wrongful act in terms of reparation and cessation.

38. It was surprising that countermeasures should be placed on a par with other legal categories, such as compliance with jus cogens norms, the exercise of self-defence, force majeure, or action in the face of a severe threat, necessity or consent. Allowing too much room for discretion in the taking of countermeasures could upset the balance required to win general acceptance of the draft articles.

39. He was not convinced of the need to establish different categories of obligations, the breach of which would give rise to State responsibility. The scope and nature of the breach would determine the consequences of the wrongful act under chapters I and II of Part Two, without the need for categorization.

40. The use of the term "international community as a whole" could create confusion and give rise to problems in the interpretation and practical application of the draft articles. It was not clear whether that community was to be understood as comprising States only or other subjects of law. His delegation therefore

supported the suggestion that the term "international community as a whole" should be replaced by the words "community of States as a whole".

41. As a matter of principle, the draft articles governed responsibility between States, a complex enough matter, and at the present stage codification should be limited to that type of responsibility. Hence the draft articles attributed to States alone the power to invoke responsibility, while excluding international organizations, other institutions or individuals from the legal regime they instituted. At a later stage, once that system had demonstrated its efficacy, it might be possible to codify other forms of invocation of State responsibility.

42. With regard to specific articles, he supported the general thrust of articles 16, 17 and 18 on the responsibility of a State in respect of the wrongful act of another State, but felt that it was not necessary that the State which assisted, directed or coerced another State should have done so with knowledge of the circumstances of the act in order to incur responsibility; it should be sufficient that the act in question would be internationally wrongful if committed by that State. Knowledge of the circumstances was in that case implicit, and to create the express condition in the text set up two different but cumulative criteria that would make it harder to attribute responsibility.

43. The title of Part Two, "Content of international responsibility of a State", could be improved. The part dealt with the nature, effects and implementation of the international responsibility of State, matters not well expressed by the term "content". Chapter I of Part Two was a fortunate addition, since it created a bridge to Part One and thereby clarified the basic structure of the draft articles. Article 30 highlighted the crucial elements of cessation and non-repetition.

44. In Part Two, chapter II, the Commission had achieved a good balance between the forms of reparation for an injury caused by an internationally wrongful act, stressing the requirement of full reparation but incorporating sufficient flexibility so that the obligation did not become unduly burdensome. The draft articles took the right approach in making restitution the preferred form of reparation, yet allowing compensation if restitution would involve a burden all out of proportion to the benefit, and making satisfaction a last resort when restitution or compensation were impossible.

45. While noting the comment of the Special Rapporteur that provisions on dispute settlement could wait until the final form of the draft articles had been decided on, he would have preferred a complete set of draft articles including provisions on dispute settlement. The complex system embodied in the draft articles and the many conflicts that might be generated by their practical application necessitated dispute settlement procedures, regardless of the final form the draft articles might take. His delegation would prefer to see them take the form of a convention. Only a binding instrument could offer the guarantees and certainty necessary to enable injured States to obtain reparation. States tended to disparage so-called "soft law". It was doubtful that a declaration would make the significant contribution to the codification of international law warranted by five decades of effort.

46. With regard to diplomatic protection, there was a substantial body of State practice and it would be quite feasible to codify, in a relatively short space of time, the relevant international rules and principles. The topic might well also contain elements of the progressive development of international law, but, if the Commission's work was to meet with success and general acceptance, it should reflect systematic international practice.

47. Diplomatic protection was a procedure whereby a State made a claim on behalf of one of its nationals in response to an internationally wrongful act by another State which had caused injury that could not be redressed by any other lawful means. For the exercise of such protection a number of basic requirements had to be met. First, a State must have violated its international obligations in the commission of the wrongful act. Second, a non-national or his property must have suffered injury which had clearly been caused by that act. Third, there had to have been a denial of justice to the non-national concerned. Fourth, the person concerned should have an effective link of nationality with the protecting State or, in exceptional circumstances, in the absence of nationality the person concerned should have a very close link with the protecting State. Fifth, it was for the State of nationality of the person affected by the wrongful act committed by another State to determine whether, in the given circumstances, diplomatic protection should be extended. In other words, the right belonged not to

the individual but to his State of nationality, to be exercised at its discretion, as State practice showed. Lastly, protection could be extended only to the extent permitted under international law and with the sole objective of obtaining reparation for injury caused to the national. Under no circumstances could diplomatic protection involve the use of force. He noted that the Commission had discussed the use of force, although the provisions of the Charter of the United Nations and international jurisprudence were absolutely clear.

48. He drew attention to three other points arising out of the Special Rapporteur's report. The first concerned the relationship between diplomatic protection and human rights. It was important to note that diplomatic protection was a broad concept, which should not be restricted to human rights issues or indeed be identified with any one issue. To do so would be counterproductive and would fail to take account of the nature of existing human rights standards. Of course, diplomatic protection could be provided in cases involving human rights violations but, as in all other cases, it should respect the basic rules and principles to which he had referred.

49. It was surprising that the Commission had not included a reference to denial of justice and did not intend to do so on the grounds that it pertained to primary rules. That argument, however, violated a basic principle of diplomatic protection: for an injury to be attributable to a State, a denial of justice had to have occurred, in the sense that there could be no further possibility of obtaining reparation or satisfaction from the State to which the act was attributable. The diplomatic protection procedure could be started only once all local remedies had been exhausted. Primary and secondary rules were not set in stone and the distinction between them was not absolutely clear-cut. Exhaustion of local resources and denial of justice were principles that could not be omitted from a draft on such an important issue.

50. Lastly, no consideration seemed to have been given to the principle of the prior renunciation of any claim for diplomatic protection. In both their constitutions and their practice, Latin American countries had cases in which non-nationals undertook activities in the territory of a State under the conditions prevailing in that State's legislation, on the understanding that they would be treated as nationals and would not seek diplomatic protection from their State of nationality in areas relating to the activities concerned. It would be inappropriate for a non-national to call for diplomatic protection in such cases. State responsibility and diplomatic protection remained closely linked as pillars of international law. The Commission should therefore assemble all the pieces of the puzzle, codifying State practice and, where necessary, introducing new rules reflecting the progressive development of international law.

51. **Mr. Fernández Valoni** (Argentina) said that, while it was right to proceed with the codification of secondary rules on diplomatic protection, which simply constituted a special case within the larger framework of State responsibility, the fact remained that such protection was a discretionary right belonging to the State concerned. Diplomatic protection was a useful remedy whereby States could protect their nationals abroad in cases where other, more recently established and theoretically more satisfactory, means were inapplicable. He had in mind the system of international human rights protection or the various mechanisms for investment protection, which were based on well-established principles deriving from the rules of diplomatic protection. A happy medium should therefore be sought between two extreme points of view: the idea that recent developments in international law had made diplomatic protection obsolete, as against the idea that diplomatic protection was a more effective way of protecting the individual. Both might be predicated on the laudable desire to promote the protection of the individual and his rights, but both were extremely simplistic.

52. The advantages and disadvantages of both courses of action — and their widely differing legal, political and moral basis — should be recognized, without overlooking the major differences between their application at regional level. Regional mechanisms were complementary, not mutually exclusive, yet it would be a mistake to overburden them with excessively high expectations. He shared the concern expressed by the representative of Mexico regarding the debate on draft article 2. The prohibition of the threat or use of force as a means of diplomatic protection was crucial, and the failure to include it in the draft articles would be a retrograde step, running counter to the Drago doctrine, which was almost a century old, and the Porter Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, which had culminated in

the rule embodied in Article 2, paragraphs 3 and 4, of the Charter of the United Nations.

53. One point worth considering was the issue of diplomatic protection for legal persons. International practice allowed States to claim for injuries suffered by their businesses abroad — whether or not it was accepted that legal persons possessed a "nationality" — and that position had been accepted in doctrine and jurisprudence. The draft articles therefore could and should deal with the issue, while bearing in mind the necessary differences between legal and natural persons in terms of diplomatic protection. It might clarify the issue if the Commission concentrated for the time being on the protection of natural persons before tackling that of legal persons.

54. With regard to the specific questions posed by the Commission in paragraph 24 of the report, his delegation concurred with the representative of France that the Commission should focus less on the conditions for granting nationality and more on the circumstances which made a link between an individual and a State unopposable by a third State. It was impossible to avoid referring to the concept of an effective or — perhaps more appropriately — genuine link. The concept of a genuine link would, of course, be relative, since its application would depend on the individual circumstances.

55. The Commission's second question was procedural in nature, relating to the burden of proof about an effective link between a national and a State. His delegation believed that there would be no justification in placing the *onus probandi* on the protecting State, which would already need to prove that a link existed for the claim to succeed. To require it to show the effectiveness of the link would be excessive, and it would be better to lay the burden of proof on the requested State.

56. The same applied to the fourth question: if the requested State could show that the person, despite holding the nationality of the protecting State, did not have an effective link with it, diplomatic protection was not appropriate. In other words, if the requesting State proved the existence of a link and the requested State could not show that the link was not opposable to it, the nationality requirement would have been met.

57. Multiple nationality was a completely different issue. As the *Salem* case and the judgement of the International Court of Justice in the *Barcelona Traction* case showed, concurrent claims could be made on behalf of a person with dual nationality, although the lack of an effective link with one of those States could be opposed to the exercise by that State of the right to protection. Protection by a State on behalf of a national with an effective link with it, where that national was also a national of another State with which he had a weaker link, did not have enough support in international practice. For example, in the *Salem* case it had been stated that if two countries considered a person to be their national neither could claim on his behalf against the other. However, the alternatives suggested by the Special Rapporteur should be explored. For example, it might be permissible for a State of nationality to be entitled to claim against another State whose nationality the individual possessed, if the latter State did not belong to a regional or global human rights mechanism. As for the last two questions, concerning the situation relating to stateless persons and refugees, he believed that the proposals *de lege ferenda*, namely, that the questions should be answered in the affirmative, formed a useful starting point.

58. With regard to unilateral acts of States, having spoken on the topic at length at the fifty-fourth session, his delegation would restrict itself to commenting on the points mentioned in paragraph 621 of the report. On the first point, his delegation agreed that if a kind of unilateral act was governed by conventional or special customary law it should be beyond the scope of the draft articles, on the principle *lex specialis derogat legi generali*. Not too much should be made of the distinction, however; some rules in such areas could be relevant. A unilateral act could not exist in a legal vacuum; it derived its validity from its inclusion in the international legal order. With regard to the distinction between general rules that could be applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts, he believed that one of the aims of the Commission's work was to extract general principles from the available material. Further action should be taken on categorizing each kind of unilateral act and reaching conclusions on rules for general application. It would therefore be correct to focus first on promises. The Commission should carry out a detailed study of the copious State practice in that regard. Indeed, a study of promises in particular and unilateral acts in general in the various legal systems could be very helpful in distinguishing the various general legal principles.

59. **Mr. Al-Baharna** (Bahrain) outlined the history of the Commission's consideration of the third report on unilateral acts of States (A/CN.4/505), which contained six revised draft articles on the topic. For lack of time, the Working Group had not been able to consider new draft article 5. A number of points had, however, gained a strong measure of support in the Working Group, which were mentioned in paragraph 621 of the Commission's report (A/55/10).

60. He drew attention to the Special Rapporteur's discussion of three preliminary issues: the relevance of the topic, the relationship between the draft articles and the Vienna Convention on the Law of Treaties and the question of estoppel and unilateral acts, which appeared in paragraphs 9 to 27 of his report. The question of the relevance of the topic had not, however, needed to be raised, since the matter had already been decided in 1997 and 1998, when the Commission had adopted the topic on the grounds that it was supported by State practice.

61. On the second point, the Special Rapporteur, after first stating his view that the Vienna Convention was a useful source of inspiration for the topic, had qualified his remarks by referring to a statement quoted in paragraph 18 of his report, in which the Commission had implicitly cautioned against following the Convention too closely, since there were essential differences between treaty law and the law pertaining to unilateral acts, as defined in his report. Despite the views of some delegations in the Sixth Committee that there was no parallel between treaty law and the law pertaining to unilateral acts, it could be said that, once a unilateral act had been validly formulated and recognized to be enforceable, it would become subject to all or some of the legal consequences attributable to a treaty act, including validity, capacity, nullity, revocation, reservation, good faith and interpretation. He referred the Committee, however, to the replies received from States on the topic of unilateral acts.

62. With regard to the question of estoppel, his delegation concurred with the Special Rapporteur's view that estoppel had no relationship with unilateral acts. There was a striking difference between the action which could give rise to estoppel and the action which could give rise to the formulation of the unilateral act, as the Special Rapporteur had shown in paragraph 27 of his report.

63. In Part One of his report, the Special Rapporteur had dealt with the difficulties involved in formulating a proper legal definition of the expression "unilateral acts of States". He had considered various elements, all of which figured in the existing draft articles, and then attempted to improve the drafting of the articles in the light of discussions in the Sixth Committee and of the written comments by Governments. With regard to the intention of the author State, the Special Rapporteur had concluded that the author's intention to produce legal acts was a crucial point and that therefore all other political acts of States should not be included in the topic. The Special Rapporteur should have the Commission's support on that point.

64. On the use of the term "act", the Special Rapporteur had justified his use of the term rather than the former term "unilateral declaration" on the basis of what he claimed were concerns expressed by delegations in the Sixth Committee, although he had acknowledged that most, if not all, unilateral acts were formulated in declarations, in exceptional taking the form of communiqués or press releases. He had used the term "act" in order to satisfy an important body of opinion which considered the term broader and less restrictive. His arguments were not, however, convincing, since in the new definition of unilateral acts the form in which the act might be used was still lacking. A unilateral act could not exist in a vacuum; it needed a form to embody it. His delegation considered that State practice, precedence and the view of the previous Special Rapporteur, Sir Gerald Fitzmaurice, all confirmed the need to express the unilateral act in a specific form. The new formulation of the definition in draft article 1 did not, therefore, provide a satisfactory solution to the problems it raised.

65. Referring to the comments of the Special Rapporteur on the legal effects of unilateral acts (A/CN.4/505, paras. 48-59), he said that the examples of State practice and precedents that had been cited appeared to have been selected with a view to supporting the arguments of the Special Rapporteur in favour of his preference for the expression "producing legal effects" in the reformulation of article 1 of the topic. However, many of the cases referred to were more relevant to the regime of treaties than to that of unilateral acts.

66. Under the heading "'Autonomy' of unilateral acts" (paras. 60-69), the Special Rapporteur had dealt with the essential issue of the non-dependence of such

acts. In that connection, his delegation supported the inclusion of the expression "autonomous" in the definition of the unilateral act but disagreed with what he considered to be a rather sweeping statement by the Special Rapporteur in paragraph 69 of his report to the effect that although the term "autonomous" was not included in the new definition submitted in his third report, it could be assumed that those acts were independent.

67. He was strongly in favour of retaining the term "unequivocal" in the definition of unilateral acts and agreed with the Special Rapporteur that the term itself should be linked to the expression of will.

68. Regarding the issue of publicity, he agreed that publicity was also an essential element in the definition of unilateral acts and noted that the expression "formulated publicly" contained in the Special Rapporteur's second report had been changed by the Commission to the expression "notified or otherwise made known to the addressee". He could see no justification for altering the earlier formulation and was in favour of its retention, particularly as that formulation had been supported by delegations in the Sixth Committee the previous year.

69. He supported the deletion of the previous draft article 1 on the scope of the draft articles for the reasons stated in paragraphs 81 to 85 of the report, and found the new draft article 2 on the capacity of States to formulate unilateral acts to be entirely acceptable.

70. Referring to the new draft article 3 on persons authorized to formulate unilateral acts on behalf of the State, as proposed by the Special Rapporteur in his report (para. 115), he said that paragraph 1 of that article, which was based, by analogy, on the rules of the Vienna Convention on the Law of Treaties, was undoubtedly acceptable; he was reluctant, however, to accept paragraph 2 since it was too broadly drafted and could give rise to the instability of legal norms. He was inclined to restrict the categories of persons who could formulate unilateral acts on behalf of the State to heads of diplomatic missions and ministers who carried valid powers from their States authorizing them to formulate specific unilateral acts for specific purposes only. That would make a valid distinction between the general authority attributed to the three categories of persons in paragraph 1 (heads of State, heads of Government and ministers for foreign affairs) and a more limited authority attributed to the category of persons in paragraph 2.

71. With reference to article 4, on subsequent confirmation by the State of a unilateral act formulated by a person not authorized for that purpose, he said that the new text was not in line with the restrictive approach he had already outlined. It was doubtful whether a unilateral act formulated by a person not authorized to do so could subsequently be approved by that person's State.

72. On the subject of "silence" and unilateral acts, he agreed with the reasoning of the Special Rapporteur (paras. 126-133) that silence could not be an independent manifestation of will since it was a reaction to a pre-existing act or situation. He considered that silence was related to the principle of estoppel, and was outside the scope of the topic.

73. The new draft article 5 on invalidity of unilateral acts (para. 167) dealt with the question of the invocation by a State of the invalidity of a unilateral act, and closely followed the Vienna Convention on the Law of Treaties. However, in view of the substantive differences between the treaty law regime and the unilateral acts regime, he doubted whether the rules of interpretation applicable to the causes giving rise to the invalidity of treaties under the treaty law regime could be applied, mutatis mutandis, to the same factors or causes listed under that article as a basis for invalidating unilateral acts.

74. **Ms. Di Felice** (Venezuela) welcomed the fact that the International Law Commission had fully taken into account the opinions of Governments, whether expressed in writing or orally in the Sixth Committee. That had given a satisfactory balance to the Commission's work on the subjects being considered by the Committee.

75. The Commission had made considerable progress at its fifty-second session in its discussion of the topic of diplomatic protection even though it had focused its attention on the topic of international responsibility, which had made it impossible to deal adequately with other topics that also deserved careful consideration. While diplomatic protection and human rights were undoubtedly connected, the two issues should be addressed in a balanced manner so as to avoid the tendency to merge diplomatic protection with human rights in general. The Special Rapporteur had submitted draft articles incorporating important

features that would be generally accepted by the Commission, and it was to be hoped that the Drafting Committee, to which some of those articles had been submitted, would be able to consider them the following year and refer them back to the Sixth Committee for its consideration.

76. The definition submitted by the Special Rapporteur in draft article 1 was generally acceptable; however, the second alternative wording of that article, submitted to the Drafting Committee, would be more clear and precise. Her delegation fully agreed that diplomatic protection was a long and complex process in which the State represented a national, or a natural or legal person, in his or her claim against another State. It was important that the drafting should be consistent with the articles relating to international responsibility.

77. She did not consider it necessary to make a specific reference in article 1 to peaceful means of resolving disputes in order to dispel doubts that might be raised by article 2 on the prohibition of the threat or use of force in the context of diplomatic protection.

78. With respect to article 2, submitted by the Special Rapporteur, she considered that the draft should clearly prohibit the use of force in the context of diplomatic protection. It was not only dangerous to introduce the possibility of the use of force in that context but it was also contrary to the trend in international relations and in international law itself. The use of force by a State for the purposes of diplomatic protection of a national should be specifically prohibited. Furthermore, the right of diplomatic protection belonged to the State and not to the individual, a fact that had been clearly established by international case law.

79. The link between a national and the State was a fundamental one, even though that principle might not be applied in the same way in all cases. It was necessary to distinguish between cases where nationality was acquired by birth or by naturalization.

80. It was interesting to note that the draft articles considered the situation of stateless persons and refugees and their right to be protected in certain circumstances. She felt it was acceptable for protection to be extended by a State to a person to whom it had granted the status of stateless person or refugee. The text should specify the conditions under which the State might exercise diplomatic protection in such cases.

81. The reports of the Special Rapporteur had greatly assisted the codification and progressive development of international law relating to unilateral acts of States. Although the topic was a difficult one, progress was possible if States displayed the political will to agree on a text that provided the required certainty in inter-State relations. In spite of the diversity of such unilateral acts, which made it impossible to devise common rules that applied to all, there were certain common aspects relating, in particular, to the validity of international acts, the causes of invalidity and other topics which could be subject of common rules applicable to all such acts. It was essential for the Commission to attempt to draw up a classification of unilateral acts in order to facilitate a more systematic approach to that subject. One complicating factor was the question of State practice, on which further clarification was required from States.

82. The reformulation of article 1 seemed to meet the concerns of some members of the Commission and of some Governments in the Sixth Committee and could therefore serve as a basis for the text as a whole. In conclusion, she said that the Commission should make a thorough study of the invalidity of unilateral acts and consider the inclusion of a provision concerning the conditions for their validity.

83. **Mr. Enayat** (Islamic Republic of Iran) welcomed the Commission's discussion of the draft articles on diplomatic protection and its decision to refer five of them to the Drafting Committee. Draft article 1 raised a number of important issues. In paragraph 1, the statement "diplomatic protection means action taken by a State" could create difficulties, because diplomatic protection was not "action" but the setting in motion of a process whereby the claim of a national was transformed into an international legal procedure. As for the meaning of "injury", if the breach or misapplication of domestic law affected an alien, and no remedy was available from the domestic courts, that could trigger the procedure for reparation of injury under international law. The concept of diplomatic protection should therefore be understood in the same sense as in classical international law, and according to State practice. The spirit of the report was to promote human rights, which he supported, but the right to exercise diplomatic protection belonged to the State of nationality. It should not be confused with the machinery for the protection of human rights. The draft articles should be based on the principle of the

sovereign equality of States and their duty to protect the rights and property of their nationals. The functional protection exercised by international organizations on behalf of their employees was a separate issue and should be discussed in another forum.

84. He would support the deletion of paragraph 2 of draft article 1.

85. In draft article 2, he suggested deleting the whole of the text following the opening statement, "The threat or use of force is prohibited as a means of diplomatic protection". That suggestion was prompted by the history of the use of force supposedly for the purpose of diplomatic protection. The concept of humanitarian intervention should not be allowed to enter the field of diplomatic protection, even under the guise of human rights. It had been invented in the previous century as an instrument of the great Powers, at a time when the prohibition of the use of force was not yet accepted as a principle of international law. On the other hand, his delegation could accept the wording proposed by some members of the Commission for a draft article X: "diplomatic protection is an international peaceful institution which excludes the recourse to or threat of use of force, as well as interference in the internal or external affairs of a State".

86. In draft article 3, he suggested inserting the words "and discretion" in the first sentence after "the right", and deleting the second sentence altogether. He had difficulty in accepting draft article 4, which conflicted with the discretionary exercise of diplomatic protection and with customary law. Draft article 5 should include a mention of the requirement that local remedies should be exhausted. According to paragraph 471 of the report, the real issue was whether a State of nationality lost the right to protect an individual if that individual habitually resided elsewhere. Because it was the discretionary right of the State to exercise diplomatic protection, the individual who had not acquired the nationality of the State of residence was not entitled to benefit from the fact of residence for that purpose, and that held true regardless of the nature of the links maintained with that State.

87. With regard to draft article 6, in his view the rule upheld in customary international law was that diplomatic protection could not be exercised against a State in respect of its own nationals. That was also the rule enshrined in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws. The 1967 European Convention on Consular Functions provided in article 46 (1) for the protection of stateless persons except where they were former nationals of a respondent State. He did not agree with the statement in paragraph 472 of the Commission's report that the most recent sources supported the rule proposed in draft article 6. Nor did he agree with the Commission that the decisions of the Iran-United States Claims Tribunal were recent sources for the evolution of the rules applying to diplomatic protection. In cases of dual nationality, most of the Tribunal's decisions rested on treaty interpretation rather than diplomatic protection, and it drew a clear distinction between the two. In Case No. 18 it had stated that the applicability of article 4 of the 1930 Hague Convention to the claims of dual nationals was debatable because, under its own terms, it applied only to diplomatic protection by a State. As the Special Rapporteur explained in paragraph 154 of his report, there were few records of current State practice concerning diplomatic protection of dual nationals against another State of which they were also nationals. The 1997 European Convention on Nationality did not take sides on the issue.

88. Draft article 7 reflected the rule enshrined in article 5 of the 1930 Hague Convention and subsequent jurisprudence, namely that the State of an individual's dominant nationality could exercise diplomatic protection on his or her behalf. However, it did not go beyond what was already said in draft article 5. With regard to the joint exercise of diplomatic protection by two or more States of nationality, he pointed out that the respondent State could seek implementation of the dominant nationality principle and deny one of the claimant States the right to diplomatic protection.

89. Concerning draft article 8, he believed the issue of refugees and stateless persons had not been recognized in customary international law. Paragraph 16 of the Schedule to the 1951 Convention Relating to the Status of Refugees provided that the issue of travel documents under the Convention did not confer on the diplomatic or consular authorities of the country of issue the right of protection. That meant that even if the domestic legislation of a refugee's State of residence recognized the right of diplomatic protection for itself, the legislation would not be opposable to other Parties. The administrative assistance mentioned by the Special Rapporteur in paragraph 178 of his report was

irrelevant to the issue of diplomatic protection. Article 2 of the International Covenant on Civil and Political Rights did not impose on States parties any duty to exercise their right of diplomatic protection. Moreover, as the Special Rapporteur stated in paragraph 183 of his report, the right would rarely be exercised in respect of refugees and stateless persons. He therefore felt that draft article 8 should be deleted.

90. **Mr. Hussein** (Iraq), said that the definition of the scope of diplomatic protection in paragraph 419 of the Commission's report and in article 1 of the draft articles seemed to leave the decision as to the measures to be taken by a State against another State in respect of an injury to one of its nationals to the discretion of the State. Legally, however, the correct position was that, when a State had exhausted local remedies, it should resort to the international courts to determine the issue of State responsibility. His delegation agreed with the numerous other delegations that had expressed the view that the use of armed force for the purposes of diplomatic protection was contrary to the principles of international law, in particular Article 51 of the Charter of the United Nations which prohibited the use of force except in self-defence.

91. His delegation's analysis of draft article 2 was that it was contrary to the Charter in that it permitted the use of force under certain conditions, in particular where a State claimed to be protecting one of its nationals. That provision seemed to be an attempt to incorporate politically motivated ideas which had no connection to international law and which could lead to the predominance of force over the law.

92. He agreed with those delegations that had emphasized the importance of strengthening the principle of human rights, a direction in which the international community had made great strides. However, the claim that the use of force was legitimate in order to defend the principles of human rights was at variance with those principles and amounted to an attempt to use such considerations for the attainment of specific political objectives. The enlargement of the concept of diplomatic protection to include the question of human rights would deprive the concept of diplomatic protection of its legal nature.

93. Turning to the topic of reservations to treaties, he said that it made a positive contribution by enabling a number of treaties of a universal nature to be ratified. In that connection, the recent trend in favour of restricting the use of reservations, or of not including provisions in international treaties permitting States to make reservations, might restrict the universality of treaties and might encourage States to make more interpretative declarations, leading to confusion as to the legal force of such declarations. Careful preparatory work was essential in order to draft comprehensive treaties to which all States could consent. During the preparatory negotiations it was necessary to take into account the interests of all States and to bring their viewpoints closer together, particularly in the case of conventions relating to human rights.

94. There were numerous legal difficulties to regarding unilateral acts as a source of international law, and it was not permissible for States to impose their own unilateral legal enactments on other States. The adoption by the General Assembly of the draft resolution contained in document A/55/L.9/Rev.1 would place on record the concern of the international community regarding the imposition of coercive economic measures adopted by certain States as a means of exerting political pressure on other States, a practice that had no basis in international law.

95. One form of unilateral act was a flagrant violation of international law, namely the imposition by two permanent members of the Security Council of unilateral action against Iraq by imposing air exclusion zones in the northern and southern regions of the country and carrying out constant aerial bombardments on political pretexts that had no legal justification. The new draft article 5 on the invalidity of unilateral acts submitted by the Special Rapporteur was applicable to such acts, which also constituted an ongoing aggression against his country.

96. **Ms. Telalian** (Greece) said she agreed with the Commission's view that diplomatic protection was an institution of continuing value and could be seen as an instrument for the protection of human rights. However, it was only designed to protect a State's own nationals, and its exercise depended on the free will of the State concerned. Future work on the topic should focus on practical suggestions to render the institution more acceptable to States as a mechanism for the peaceful solution of disputes concerning the treatment of aliens.

97. Draft article 1 defined diplomatic protection in traditional terms, as a discretionary right of the State of

nationality. That did not conflict with the interest of the individual. However, the term "action" in the context of diplomatic protection could include resort to the threat or use of force, and she opposed that approach. The exercise of diplomatic protection should be confined to peaceful methods, and be governed by the rules of general international law and of the Charter of the United Nations. She therefore welcomed the Commission's decision to delete draft article 2. There should be no ambiguity in draft article 1 concerning the prohibition of the use of force. Paragraph 1 of draft article 1 should reflect the fundamentals of the principle of diplomatic protection which were widely accepted by States and already formed part of customary international law. The use of the term "omission" might cause confusion. Otherwise, she agreed with the approach that diplomatic protection could be triggered only in respect of an internationally wrongful act which had caused injury to the national of a particular State. The customary law requirement of the exhaustion of local remedies, confirmed by the International Court of Justice in the *Interhandel* case, should be included in the draft articles.

98. Customary international law also called for a link of nationality with the claimant State, a requirement which raised difficulty in the event of dual or multiple nationality if the respondent State was the State of the second nationality. The result of applying the rule in article 4 of the 1930 Hague Convention could be to deprive an individual of diplomatic protection altogether. However, since that time the principle of effective or dominant nationality had emerged, as found in Case No. 18 of the Iran-United States Claims Tribunal and in the *Mergé* case decided by the Italian-United States Conciliation Commission. On that basis, draft article 6 incorporated the principle of effective and dominant nationality and set aside the principle of non-responsibility, an approach with which she fully agreed. She also agreed with the content of draft article 7, which was likewise based on the principle of effective and dominant nationality and on recent case law, as well as on article 5 of the 1930 Hague Convention, a provision which had been unanimously accepted. However, it might be inadvisable to retain draft article 5. The conditions for acquiring nationality had little to do with the establishment of the nationality link for the purpose of diplomatic protection. Some guiding principles on the element of good faith required when granting nationality could be derived from the *Nottebohm* case. Paragraph 2 of draft article 1 departed from the requirement of the nationality link, as found in customary international law and State practice in the field of diplomatic protection. The provision in that paragraph would not necessarily benefit stateless persons or refugees.

99. Turning to the topic of unilateral acts of States, she agreed with the suggestion that the scope of the topic should be limited by focusing on acts of States which produced legal effects. In draft article 1 the Commission was proposing an interesting definition of unilateral acts, but the intention of the author State should not be the only criterion for determining the binding effect of a unilateral act; the expectations created by it should also come into play. The other issues raised by the Special Rapporteur called for careful examination in future sessions of the Commission. Paragraph 621 of the Commission's report contained useful suggestions for its future work on the topic.

The meeting rose at 1.08 p.m.

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Chairman: Mr. Politi .... (Italy)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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The meeting was called to order at 10.15 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Jacovides** (Cyprus), speaking on chapter V of the report, recalled that in 1960, as a graduate student, he had worked at Harvard Law School on the question of "the right of a State to compromise, waive or settle claims of its nationals", which was then already a developed area of international law, in terms of both customary and treaty law. He had the impression that it had not altered much since that time. He agreed with the basic thesis of the nine draft articles on diplomatic protection presented by the Special Rapporteur, namely that despite the emergence of various dispute settlement mechanisms to which individuals had been given access, diplomatic protection remained an important tool for their protection in the international arena. He also sympathized with the Special Rapporteur's desire to treat it as a means of promoting human rights. The approach adopted in draft article 1, that diplomatic protection was the right of the individual, was in keeping with progressive thinking on the matter.

2. However, the prevalent view was that it was the discretionary right of the State to espouse and present a claim to another State based on its wrongful act. States were under no obligation to do so, although such an obligation might in some cases exist in constitutional law. Draft article 2 raised the issue of whether forcible intervention was permitted in international law to protect nationals. That issue fell within the broader topic of State responsibility. The use of force to protect nationals abroad should not be considered in isolation from the relevant provisions of the Charter of the United Nations and of *jus cogens*.

3. Draft article 3 raised the issue of whose right was being asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. It should be recognized that diplomatic protection was a right attaching to the State, which it could exercise at its own discretion. In practice, a State would probably refrain from exercising its right when the person affected had an individual remedy. Alternatively, it might join with the individual in exercising his or her right under the relevant treaty, as had happened on several occasions in the jurisdiction of the Council of Europe. The approach adopted in draft article 3 reflected the traditional view, derived from the *Mavrommatis Palestine Concessions* case, in which the Permanent Court of International Justice had held that diplomatic protection was the right of the State, which did not act as the agent of the injured national. The Special Rapporteur's proposition, as reflected in draft article 4, that the provision in some States' constitutions establishing a right to diplomatic protection should be reflected in international law, was not supported by State practice. With regard to draft article 5, the current position was that of the International Court of Justice in the *Nottebohm* case. The nationality requirement was linked with the requirements of denial of justice and the exhaustion of local remedies.

4. His delegation maintained an open mind on the issues raised in draft articles 6, 7 and 8 with regard to multiple and dominant nationality and stateless persons and refugees. The Commission could make a real contribution by developing the rules on those points in line with progressive contemporary views, beyond the traditional rules of customary law.

5. Turning to the topic of unilateral acts of States, covered in chapter VI of the report, he welcomed the substantial progress made on a topic which represented hitherto uncharted terrain, covering a great variety of unilateral acts in the practice of States. He could support the reformulations of draft articles 1 to 7 submitted by the Special Rapporteur, including the definition of unilateral acts in draft article 1. He had an open mind on whether estoppel could be included in the category of unilateral acts. He supported the proposals of the Working Group for further work on the topic.

6. On chapter VII of the report, dealing with reservations to treaties, he believed that the relevant provisions of the Vienna Convention on the Law of Treaties set down the basic rules on the subject. However, because of the developments which had taken place since then it would be useful to develop a guide to State practice in that field. In chapter VIII, on international liability for injurious consequences arising out of acts not prohibited by international law, he welcomed the emphasis placed on prevention, which was especially significant in international environmental law.

7. **Mr. Hmoud** (Jordan) said that in view of the conflicting views which had emerged on the topic of

diplomatic protection, such as the nature of the institution and its consequences, and its relationship with the right of States to grant nationality, it was crucial that States should offer the Commission guidelines for its work. The definition of diplomatic protection should clarify whether the injured person was a natural or legal person, or both. He believed it should extend to legal persons, because the decision in the *Barcelona Traction* case had made clear that it could. In exceptional circumstances, it could also be extended to non-nationals. Refugees and stateless persons did not enjoy sufficient international protection under existing law. A refugee whose property was illegally confiscated in a State other than the State of asylum had no international remedy, nor did a stateless person who suffered torture in a State other than the State of residence. States should be entitled to exercise diplomatic protection in favour of refugees or stateless persons who were legally resident in them. In such cases, residence could be deemed to show an effective link between the non-national and the State. The use of force as an exceptional means of diplomatic protection would contravene the requirement in the Charter of the United Nations that States should refrain in their mutual relations from the threat or use of force. In the past, the doctrine of diplomatic protection had been abused as a pretext for attacking other States, toppling regimes and jeopardizing the territorial integrity and political independence of weaker States. The Commission's draft articles on State responsibility prohibited the use of force by way of countermeasures, and it would be inconsistent to allow it in the case of diplomatic protection.

8. With regard to draft articles 3 and 4, he supported the view that diplomatic protection was a right of the State, not of the individual. A State should not be subject to the will of the injured person in exercising it, even in the case of a grave breach of *jus cogens* rules of human rights law. If it became an obligation for States to exercise diplomatic protection, the exemption in paragraph 2 (a) of draft article 4 would compel a weak State to disclose the reasons for not exercising it, thereby revealing information perhaps of a crucial nature, failing which it could be internationally condemned for committing a wrongful act. Progressive development of the law should not entail imposing an internal law obligation on a State in the conduct of its international relations.

9. On the question of nationality, he drew a distinction between the absolute right of States to confer their nationality on individuals, and the issue of nationality for the purpose of diplomatic protection. For the latter purpose, according to *opinio juris*, birth and descent constituted sufficient links between the State and the individual. In the case of naturalization, the issue was not so clear. According to the decision in the *Nottebohm* case, however, if a State other than the State of naturalization exercised the right to invoke diplomatic protection, the latter State would have to prove the existence of an effective link. In the case of dual or multiple nationality, he supported the idea of joint exercise of diplomatic protection, provided the States concerned did in fact act jointly, thus avoiding the risk of diluting their common rights.

10. It would be preferable to delete draft article 6. The decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission did not provide sufficient proof that according to customary law, a State could exercise diplomatic protection on behalf of an injured national against another State of which that individual was also a national. It would only encourage "nationality shopping" or "forum shopping" if individuals lacking access to due process in their countries of origin were able to seek diplomatic protection through the nationality of another State.

11. **Mr. Rogachev** (Russian Federation), referring to the topic of unilateral acts of States, said that the legal norms governing such acts were not yet fully clear, which made codification difficult. There was a great variety of such acts, and differing points of view on whether certain acts of States could be classified as unilateral acts or not. The Special Rapporteur had endeavoured to formulate some draft articles, beginning with the codification of general principles relating to all unilateral acts. He agreed with the predominant view in the Working Group which favoured a preliminary survey of State practice in that field. The best course was to define the category of acts of States which could be classified as unilateral, and then to ascertain the legal character of each act.

12. Concerning the definition of unilateral acts, he supported the removal of the criterion of "publicity" and of the concept of "multilateral" unilateral acts, and the replacement of "acquiring international legal obligations" by "producing legal effects". However, the new definition was not entirely flawless. It would be

useful to include in it a provision that a unilateral act was performed with the intention of producing legal effects under international law, thus confirming that there was a link between such acts and international law. After all, the legal significance of the act and its binding force had to be decided according to international law, specifically the principle of good faith. The question of estoppel could not be left out, because it was closely connected with unilateral acts, although the connection had mainly to do with its consequences.

13. The inclusion of draft article 5, on the invalidity of unilateral acts, was a step in the right direction. However, it appeared from the text of the article and from the report itself that a unilateral act could deviate from a dispositive rule of international law. Such an act could be lawful only if it was an act preliminary to the conclusion of a treaty. Draft article 5 should perhaps make clear that such a unilateral act could not have legal force until it was accepted by another State.

14. He concluded by saying that the fundamentals of the topic were still being worked out, and there was a great deal of work yet to be done.

15. **Mr. Al-Baharna (Bahrain)**, commenting on the topic of diplomatic protection, said that the term "action" in draft article 1 was not appropriate. Diplomatic protection should be defined as the peaceful exercise by a State of its right to afford protection to a national. There should be no suggestion that force could be used; the conduct of a State in exercising its right must comply with the principles of international law. For the purpose of claiming protection, the national concerned must have acquired the nationality of the State in question by birth, descent or bona fide naturalization. The principle in article 1 of the 1930 Hague Convention that it was for each State to determine under its own law who were its nationals created a strong presumption that the nationality so determined would be acknowledged for international purposes. In granting nationality, States had to comply with international standards that were sometimes linked to the requirements of human rights protection. The Special Rapporteur, in paragraph 102 of his report (A/CN.4/506), confirmed that birth and descent were recognized by international law as a satisfactory connecting factor for the conferment of nationality. The question arose, with reference to the *Nottebohm* case, whether naturalized individuals had to have an additional "genuine" or "effective" link with the State of naturalization, even where they did not have a second nationality. However, that requirement could be restricted to the special facts of the *Nottebohm* case; it should not be treated as a general principle of international law, applicable without distinction to any and every case of diplomatic protection. He therefore agreed with the view of the Special Rapporteur, expressed in paragraph 111, that the principle of an effective and genuine link should not be seen as a rule of customary international law in cases not involving dual or plural nationality. In the *Flegenheimer* case, the Italian-United States Conciliation Commission had found that where a person was vested with only one nationality, the theory of effective nationality could not be applied without the risk of causing confusion. He therefore agreed with the Commission that it was doubtful whether the International Court of Justice, in the *Nottebohm* case, had intended to establish a rule of general international law.

16. On the question of dual nationality, article 3 of the 1930 Hague Convention laid down that a person with two or more nationalities could be regarded as its national by each of the States whose nationality he possessed. Many States prohibited their nationals from holding the nationality of another State. However, to reduce the conflict arising from dual nationality in the event of diplomatic protection, he felt the draft articles should incorporate the principle in article 4 of the Hague Convention to the effect that a State might not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. In the case of a national having an effective link with one State and a weak link with another, the *Nottebohm* case should be followed for guidance, reliance being placed on the effective link.

17. In the case of diplomatic protection for a national with dual nationality against a third State whose nationality he did not possess, there should be proof of an effective link between him or her and the State claiming to exercise protection, without compromising the general principle that any State of which a dual or multiple national was a national could afford the national diplomatic protection in respect of a claim of injury arising in another State of which he or she was not a national. The same principle should apply in cases of joint protection by two or more States of a national injured in another State.

18. In view of human rights principles and current developments relating to the status of stateless persons,

it should be possible for a State in which such a person resided to give him or her diplomatic protection in a third State. The same principle should apply to a refugee lawfully resident in any State, provided the State of which he was a national declined to take action on his behalf. Draft article 8 would give States a discretionary right in respect of stateless persons and refugees, without imposing any obligation on them.

19. **Mr. Burri** (Observer for Switzerland) said that States had discretionary power in the exercise of diplomatic protection; international law did not give individuals the right to such protection, although domestic law might do so. However, draft article 4 stated that unless the injured person was able to bring a claim before a competent international court or tribunal, the State of nationality had a legal duty to exercise diplomatic protection upon request. That proposal, which reflected developments in international law, deserved further consideration.

20. It was open to question whether the use of force was legitimate even in the cases provided for in draft article 2. However, the issue was irrelevant, since the threat or use of force was not an instrument of diplomatic protection, which, as a form of peaceful settlement of disputes, prohibited any such action.

21. He took it that the provisions of draft article 5 would not affect States' right to establish their own conditions for the granting of nationality and that States would exercise diplomatic protection only on behalf of their own nationals as defined under internal legislation. Moreover, the term "bona fide" was too vague and might conflict with the concept of an effective link between the individual and the State of nationality; the result might be to leave an injured person without diplomatic protection if the State with which he had an effective link was one whose nationality he was deemed to have acquired in bad faith. Further information on the matter would be useful.

22. Draft article 6 was unacceptable: regardless of the existence of an effective link between the individual and the State, no State would willingly grant another the right to intervene in its affairs on behalf of an individual whom it considered one of its own nationals. However, dual nationals should be entitled to consular protection from one State of nationality against another State of nationality under certain circumstances, such as cases of serious, repeated violations of the fundamental principles of international law.

23. Draft article 7 was also problematic; dual or multiple nationals should not be entitled to diplomatic protection against third States unless they had an effective link with the State exercising such protection. There was no reason to abandon the principle, established in the *Nottebohm* case, that the claimant's nationality must be opposable to the respondent State. Thus, it would be impossible for two or more States of nationality to jointly exercise diplomatic protection.

24. While he understood the justification for the mention of stateless persons and refugees in draft article 8, the host country's intervention should be limited to consular protection.

25. Lastly, he looked forward to the results of the Commission's deliberations on the exercise of diplomatic protection on behalf of legal persons and on the exhaustion of domestic remedies.

26. **Mr. Baena Soares** (Brazil), speaking on the topic of diplomatic protection, said that in accordance with Article 2 of the Charter of the United Nations and subject to the exception mentioned in Article 51 thereof, the use or threat of force should be prohibited in all cases. He welcomed the growing consensus on that issue. The draft articles should cover only natural persons, not legal persons. Furthermore, the exercise of diplomatic protection should remain a discretionary right of States.

27. Turning to the draft articles on unilateral acts of States, he stressed the need to establish which persons were authorized to formulate such acts. Authorization should be limited to heads of State and Government, Ministers for Foreign Affairs and, where State practice so dictated, other authorized persons; however, caution must be exercised in order to prevent multiple and conflicting declarations from being made by officials at different levels of a single State's Government.

28. **Mr. Yamada** (Chairman of the International Law Commission) introduced Chapters VII, VIII and IX of the report of the International Law Commission on the work of its fifty-second session (A/55/10).

29. With regard to Chapter VII, on reservations to treaties, the Commission had considered the report of the Special Rapporteur, Mr. Alain Pellet (A/CN.4/508 and Adds. 1-4) and had adopted five draft guidelines

with commentary, which completed the first chapter of the draft Guide to Practice.

30. Draft guideline 1.1.8 established that unilateral statements made under exclusionary or opting-out provisions of a treaty constituted reservations. The issue was controversial; the International Labour Organization (ILO) strongly opposed that interpretation, which was not reflected in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. However, those Conventions did not preclude the formulation of reservations on the basis of specific treaty provisions. Moreover, a number of ILO conventions provided for the possibility of unilateral statements in connection with exclusionary clauses; such statements corresponded exactly to the definition of reservations and need not be subject to a separate legal regime. While it was true that some conventions contained both exclusionary and reservation clauses, that was merely due to the vagueness of terms.

31. The case was analogous to that covered by article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions, which dealt with the consent of States to be bound by part of a treaty; moreover, some treaties allowed the Parties to exclude, by unilateral statement, the legal effect of certain provisions even after the instrument had entered into force. Such statements were not reservations since they did not place conditions on the accession of the Party that made them; they were closer to partial denunciations and could be linked to Part V of the 1969 and 1986 Vienna Conventions concerning invalidity, termination and suspension of the operation of treaties.

32. Draft guideline 1.4.6 stipulated that unilateral statements made under an optional clause, which differed from statements made under an exclusionary clause, were not reservations and thus lay outside the scope of the draft Guide. Statements made under optional clauses had the effect of increasing the declarant's obligations beyond what was normally expected of parties to the treaty and did not affect its entry into force for other parties. Such clauses typically involved acceptance of a certain mode of dispute settlement or of monitoring by a treaty body. The statements in question differed from those covered by draft guideline 1.4.1 only in that they were formulated under a treaty rather than on the author's initiative. However, the Commission had considered the provision useful because such statements were the counterparts of those made under exclusionary clauses.

33. The second paragraph dealt with restrictions or conditions that frequently accompanied the statements covered by the draft guideline. Such conditions could not be equated with the restrictions contained in unilateral statements made under optional clauses in the context of reservations to a multilateral treaty; while it was true that the objective of such restrictions or conditions was to limit the legal effect of a treaty's provision, they did not in themselves constitute unilateral statements.

34. Draft guideline 1.4.7, which established that unilateral statements providing for a choice between the provisions of a treaty, did not constitute reservations and lay outside the scope of the draft Guide, reflected the latter's pedagogical nature. Article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions dealt with treaties that permitted a choice between differing provisions, a common practice illustrated by numerous Council of Europe and ILO treaties. Such provisions should not be equated with the optional clauses referred to in draft guideline 1.4.6 since the statements which they invited parties to formulate were binding and required for entry into force of the treaty. The draft guideline also covered treaty clauses that obliged parties to choose between provisions, a less common practice found primarily in ILO conventions. Although such alternative commitments resembled reservations in many respects, they differed in that the conditions for the author's participation and the exclusion envisaged were provided for in the treaty itself.

35. Section 1.7 of the draft guidelines embodied the Commission's view that since reservations were not the only way in which parties to a treaty could exclude or modify the legal effect of certain of its provisions or of certain aspects of the instrument as a whole, it would be useful to link the definition of reservations and interpretive declarations to that of other procedures with the same objective.

36. Draft guideline 1.7.1 addressed the issue of procedures involving the insertion into a treaty of restrictive clauses, escape clauses, derogations or bilateralization procedures purporting to limit its scope or application or the conclusion of an agreement, under a specific provision of a treaty, by which two or more parties purported to exclude or modify the legal effect

of certain of its provisions as between themselves. Other techniques included suspension of the treaty and amendments which were not automatically binding on all parties; such procedures could take place even after the instrument's entry into force. Since they had sometimes been erroneously referred to as reservations, the Commission had considered it useful to clarify the matter in the draft Guide. Bilateralization, for its part, allowed States parties to a multilateral convention to choose the partners with which they would implement the regime provided for therein.

37. Draft guideline 1.7.2 covered alternative procedures by which parties could specify or clarify the meaning or scope of a treaty's provisions through the insertion of provisions purporting to interpret the instrument or the conclusion of a supplementary agreement for that purpose. Since such procedures were always treaty-based, they were valid alternatives to conditional interpretive declarations.

38. The second part of the Special Rapporteur's fifth report (A/CN.4/508/Add. 3 and 4) dealt mainly with the formulation of reservations and interpretive declarations. The key issues addressed were those of the moment and the modalities of formulation.

39. Draft guidelines 2.2.1 and 2.2.2 dealt with reservations formulated when signing the treaty or when negotiating, adopting or authenticating the treaty. The Special Rapporteur was of the view that such reservations must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty.

40. Draft guideline 2.2.3 stated that reservations formulated when signing an agreement in simplified form did not require any subsequent confirmation. In the Special Rapporteur's view, that was a logical consequence of the nature of the agreement. On the other hand, if a treaty provided that a reservation might be made upon signing, the reservation did not have to be confirmed at the time of expression of consent to be bound, and that was a substance of draft guideline 2.2.4.

41. With regard to the difficult problem of late reservations, the Special Rapporteur proposed in draft guideline 2.3.2 that in effect late reservations might be deemed unanimously accepted if no objection had been made by any contracting party within a 12-month period following the date on which notification was received. If, however, an objection had been made, under guideline 2.3.3 the treaty should enter into or remain in force in respect of the reserving State or international organization without the reservation being made.

42. The report also addressed several issues pertaining to the formulation of interpretive declarations and conditional interpretive declarations. Those issues would be considered at the next session of the Commission.

43. The Commission would welcome any comments or observations on the draft guidelines, including those it had not yet discussed, and any additional answers to the questionnaires circulated to States on the topic of reservations to treaties.

44. Chapter VIII of the Commission's report dealt with international liability for injurious consequences arising out of acts not prohibited by international law. In his third report (A/CN.4/510), the Special Rapporteur on prevention of transboundary damage from hazardous activities presented a draft preamble and a revised set of draft articles with the recommendation that they should be adopted as a framework convention. He said that the draft articles essentially constituted progressive development on the topic and sought to evolve procedures enabling States to act in a concerted manner on the issue of prevention.

45. Most of the changes to the draft articles had been introduced as a result of suggestions formulated by States. New articles 16 and 17 on measures of preparedness were based on similar provisions in the Convention on the Law of Non-Navigational Uses of International Watercourses. Other issues addressed in the third report included the scope of the topic, the relationship between prevention and liability, the relationship between the duty of prevention and an equitable balance of interests among States and the duality of the regimes of liability and State responsibility. The report raised the issue of whether the subtopic of hazardous activities should continue to be addressed within the broader category of acts not prohibited by international law.

46. The paragraphs of the draft preamble reflected concerns expressed by States regarding the right to development, a balanced approach to dealing with the environment and development, the importance of international cooperation and limits on the freedom of States.

47. In the debate on the third report, most Commission members had held the view that with a few drafting changes the articles would be ready for adoption. They had seen the draft articles as a self-contained set of primary rules on risk management or prevention, which would not prejudice any higher standards and more specific obligations under other environmental treaties.

48. The point had been raised that a reference to the duty of due diligence might imply that the draft articles would not apply to intentional or reckless conduct and might create confusion with issues of State responsibility. The Special Rapporteur had responded that the element of *dolus* or the intention or legality of the activity was not relevant to the purposes of the draft articles; the articles were intended to cover all activities that risked causing transboundary harm, including military activities, assuming that they were fully permissible under international law.

49. With regard to the draft preamble, support had been expressed for including references to positive international law, since there existed a series of conventions that had a direct bearing on the subject matter. On the possible deletion of the words "acts not prohibited by international law", opinion had been divided. It had been noted that deletion might require a review of the entire text, broaden the scope of the draft articles, weaken the notion of prohibition, blur the legal distinction between the topics of State responsibility and international liability and seem to legitimize prohibited activities. Others had stated that deleting the phrase would not require a review of the entire set of draft articles, and that in the case of an illegal activity State responsibility would apply; the focus of the Commission's work on the topic was the content of prevention and not the nature of the various activities. The Special Rapporteur had responded that, irrespective of the retention or deletion of the phrase, the main value of the draft was the emphasis placed on the obligation to consult at the earliest possible stage.

50. The Commission had concurred that the draft articles should be adopted as a framework convention and had referred the draft preamble and the revised draft articles to the Drafting Committee. The Commission would welcome any comments by Governments on the draft provisions.

51. Chapter IX of the report dealt with other decisions and conclusions of the Commission, including its long-term programme of work. The Working Group established to look into the matter had presented a set of proposed new topics, of which five had been chosen: responsibility of international organizations; effects of armed conflicts on treaties; shared natural resources of States; expulsion of aliens; and risks ensuing from fragmentation of international law. For each of the topics a syllabus was annexed to the report of the Commission. In selecting the five topics, the Commission and its Working Group had been guided by criteria related to the utility and practicality of the topics and their codification.

52. Although the topic of the risk ensuing from fragmentation would not result in codification in the normal sense, the Commission felt that the topic involved increasingly important issues on which it could make a contribution and that it was well within the Commission's competence and in accordance with its statute.

53. With regard to the length and duration of future sessions, the Commission had concluded that split sessions were more effective. With a split session, normally its work could be completed in less than 12 weeks per year. It saw good reason for reverting to the older practice of a total annual provision of 10 weeks per year, with a possibility of extension to 12 weeks in particular years as required. The Commission felt that its work requirements made it essential to hold a 12-week split session the following year at the United Nations Office in Geneva. Thereafter, in the initial years of the quinquennium, the total length of the session should be 10 weeks per year and during the final years, 12 weeks. Normally the Commission would continue to meet in Geneva. However, in order to enhance the relationship between the Commission and the Sixth Committee, one or two of its half sessions might be held in New York towards the middle of the next quinquennium.

54. The Commission was very aware of the General Assembly's request that it implement cost-saving arrangements. Because of the heavy workload in the past year, the Commission had not been able to achieve much in the way of cost reduction, but it had worked diligently and had used 95 per cent of the allocated conference facilities. Average attendance had been 73.88 per cent, an improvement over the previous year.

55. As in the past, the Commission had cooperated with other bodies, including the Inter-American

Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Committee on Legal Advisers on Public International Law. Judge Gilbert Guillaume, President of the International Court of Justice, had given an address to the Commission, followed by an exchange of views. The Commission members had also had an informal exchange of views with members of the legal services of the International Committee of the Red Cross on topics of mutual interest.

56. The thirty-sixth session of the International Law Seminar had been held at the Palais des Nations with 24 participants of different nationalities, mostly from developing countries. The participants had observed plenary meetings of the Commission and attended lectures especially arranged for them. Of the 807 participants, representing 147 nationalities, who had taken part in the Seminar since its inception in 1965, 461 had received a fellowship. The Seminar enabled young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the other international organizations with headquarters in Geneva. The Commission wished to express gratitude to those Governments that had made contributions to the Seminar and urged them to continue to do so. The organizers of the Seminar had had to draw on the reserve of the Fund for the present year. Should the situation continue, funds might not allow for the same number of fellowships to be awarded in the future.

57. Thanks to generous contributions from the Government of Brazil, the Commission had held the fifteenth Memorial Lecture in honour of Gilberto Amado. Professor Alain Pellet from the University of Paris X-Nanterre and member of the Commission had spoken on the subject of "'Human rightism' and international law".

58. **Mr. Hilger** (Germany), speaking on reservations to treaties, said that his Government could accept the five new draft guidelines adopted by the Commission on first reading, as it had supported the previous guidelines adopted on first reading. Clearly much thoughtful legal analysis on the definitions of reservations and interpretive declarations had gone into the report and the Commission's debate. However, his delegation would like to renew its appeal to the Commission to concentrate on finding practical solutions to real life problems.

59. His delegation welcomed the new draft guidelines on alternatives to reservations. Like reservations, alternative procedures could protect the integrity of the object and purpose of a treaty while at the same time allowing a maximum number of States to become parties, even when not all of them were able to assume full treaty obligations. Such alternative procedures as contracting-out and contracting-in clauses, restrictive clauses, escape clauses, saving clauses and derogation clauses could serve the same purpose as reservations while avoiding their drawbacks.

60. It was to be hoped that the Commission's guidelines would cause States to attach greater importance to alternatives to reservations. It was in the negotiating phase that creative solutions should be found and incorporated into the text of multilateral treaties in order to avoid reservations with their often negative consequences. That would be possible only if States participating in convention conferences did not leave the question of reservations and alternatives until the end, when time pressure would result either in no provision on reservations or a mere restatement of the rule that reservations must be compatible with the object and purpose of the treaty.

61. In the second part of his fifth report (A/CN.4/508/Add. 3 and 4), not yet debated in the Commission, the Special Rapporteur dealt with problems of late reservations, in other words, reservations formulated by States after they had expressed their consent to be bound by a treaty. His delegation agreed that it might undermine the principle of *pacta sunt servanda* if objections to late reservations had the same limited effect as objections to timely reservations. Late reservations could be accepted only if all other parties to the treaty gave their unanimous, if only tacit, consent. A single objection to a late reservation prevented it from producing its effects.

62. Since the Secretary-General of the United Nations was the most important depositary of multilateral treaties, his delegation welcomed the recent decision to extend the 90-day period for objections to late reservations to 12 months. The extended time period enabled Governments to analyse and assess late reservations and allowed for dialogue between the formulating State and the other contracting parties.

63. Also welcome was the new practice of the Treaty Section of the United Nations to distribute depositary

notifications electronically, thereby putting an end to the serious problems caused by long delays.

64. Despite those practical solutions, however, there was a matter of principle that related to the draft articles on reservations to treaties. Whatever the deadline for objections to late reservations, it could not be counted from the date appearing on the notification. It was the responsibility of the sender to effect receipt of the letter or note by the addressee, and the period should run from the date of receipt.

65. The problems associated with late reservations had recently acquired practical importance in the case of so-called modifications of reservations. The Special Rapporteur seemed to hold the view that a modification of a reservation in most cases constituted a diluted form of withdrawal or partial withdrawal. Clearly, modifications of reservations were permissible and even welcome if they constituted a partial withdrawal of reservations. In such cases other contracting parties could not object. It would be regrettable if the United Nations Treaty Section were to circulate such welcome modifications of reservations with an invitation to object. The result might be that an ill-founded objection by a single State might render the partial withdrawal of the reservation null and void.

66. Problems arose, however, when the modification of a reservation not only subtracted from the original reservation but changed its nature or scope by adding something to it. In that case, the modification of a reservation would actually constitute a new late reservation, for which the tacit unanimous consent of all contracting parties, in other words, the total absence of objections within one year from the date of receipt of the depositary notification, would be required for acceptance.

67. A recent case would illustrate some of the problems that could arise in the handling of modifications of reservations. The previous year, the Permanent Mission of Germany to the United Nations had received a notification of a modification of a reservation to the Convention on the Elimination of All Forms of Discrimination against Women just two weeks short of the 90-day deadline for objections. Examination had revealed that it constituted not a partial withdrawal but a new late reservation necessitating consultation with other contracting parties. Although the objection had been filed within 90 days of receipt of notification, the depositary listed the modification of the reservation as accepted by all States and the German objection as a mere communication, a term used for late objections. That example demonstrated the need for continued dialogue with the Office of Legal Affairs of the United Nations and particularly its Treaty Section on the handling of past and present modifications of reservations.

68. It might also be helpful to consider the reintroduction to the Committee's agenda of a topic entitled "Practice of the Secretary-General as depositary of multilateral treaties", which would foster a better understanding on all sides of the complexities of the issue. The discussion might be based on an updated edition of the summary of practice of the Secretary-General as depositary of multilateral treaties (ST/LEG/SER.D/7/Rev.1), on which the Secretariat had reportedly been working for some time. He also reiterated his delegation's appeal to the Commission and the Special Rapporteur to concentrate on the question of inadmissible reservations — their practical effects and consequences — on which the Commission's help would be more useful than in the rather academic area of definitions.

69. With regard to the topic of international liability for injurious consequences of acts not prohibited by international law, he said that the draft preamble and revised articles constituted an appropriate basis for discussion. As they stood, they provided for a reasonable balance of both the economic interests of States of origin and the interests of States likely to be affected. Prevention should be the key principle of the draft articles, which ought to contain clear references to international law. His delegation supported the deletion of the phrase "not prohibited by international law" in article 1, since the rules of State responsibility would apply in the case of illegal activity.

70. **Mr. Tanzi** (Italy), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, a topic to which his delegation attached particular importance, said that, in joining the consensus that the Commission should first deal with prevention and later with the consequences of harm, his delegation — in common with many others — had not thought that the Commission's task would be completed without a treatment of liability proper. He would therefore make only preliminary remarks on the draft articles.

71. As his delegation had suggested previously, the draft articles should cover not only significant transboundary harm but also harm caused in areas outside national jurisdiction. Draft article 1 — and, where required by drafting consistency, other articles, especially article 3 — should be amended to that effect, bringing the draft articles into line with the authoritative assessment by the International Court of Justice that the general principle of prevention of environmental harm applied specifically to regions over which no State had sovereignty. Concerns over the protection of the ecosystems pertaining to the relevant environments should be reflected in the draft, in either article 1 or article 2. The same articles should contain an explicit reference to both public and private sector activities, even though only States would be accountable for their compliance with the draft articles. As for the phrase "not prohibited by international law", his delegation preferred, on balance, that it should be retained, considering the wide range of implications involved.

72. His delegation shared the widespread concern at the exclusion of creeping pollution from the scope of the draft articles. One of the main features of a sound environmental impact assessment was the period of time involved, in combination with other sources. Significant transboundary harm resulting over a period of time should thus be subject to the obligation of prevention. The reasonableness of that obligation, however, depended on its being an obligation of conduct and not of result.

73. Turning to the relationship between the topic under discussion and State responsibility, he said that the former concerned a primary substantive obligation — that of prevention of significant harm — complemented by a host of procedural rules, the breach of which would entail international responsibility. Draft article 3, however, codified the customary no-harm rule as a due diligence obligation. In other words, the mere occurrence of harm would not entail responsibility; "negligent harm" would be required for there to be wrongfulness. To argue that non-fulfilment of the due diligence obligation of prevention did not imply unlawfulness, however, was tantamount to nullifying the whole endeavour, particularly in view of the efforts to calibrate the obligation of prevention in due diligence terms, which had been the result not of juridical sophistication but of a difficult political compromise that had been hammered out over the years.

74. The State liability regime would, in his delegation's view, involve another set of primary obligations — mostly of a due diligence nature — arising out of the occurrence of harm, despite the fact that due diligence had been observed or when the lack of it could not be established. The regime should involve State-to-State compensation only in subsidiary terms, since the financial side should be tackled primarily through the internalization of the civil liability of the operators concerned and compulsory insurance. There was a need for a differentiated application of the due diligence obligation proportional to the economic and technological development of the States concerned. Accordingly, in order to enhance and harmonize the prevention capacity of individual States, the provisions on cooperation and implementation in draft articles 4 and 5 should be further articulated and provide for more stringent rules.

75. The improvements to draft article 6 were welcome. Article 7, however, on environmental impact assessment, required further elaboration. Confining the requirements of such an assessment to activities subject to the authorization regime seemed of limited use. Since, under article 6, such activities fell within the scope of the draft articles, it would be almost impossible to assess whether or not a given activity involved a risk of causing significant transboundary harm, as some Governments had pointed out in their written comments. The Commission should also consider providing guidance to national legislators on criteria for making an environmental impact assessment, drawing on existing conventional practice, especially as developed at the multilateral level in the framework of the United Nations/Economic Commission for Europe process. Such assessment was one of the factors for the determination of "all appropriate measures" making up the due diligence standard of prevention, but the Commission should consider mentioning other elements of international practice, such as the best available technology, the best environmental practices, the "polluter pays" principle (in preventive terms) and the precautionary principle. Indeed, the last two principles had been recommended for inclusion in the latest long-term programme of work for the Commission.

76. As for the procedural aspect of the draft articles, the changes in the new versions of articles 9, 10 and 12

were welcome, all the more so since the draft articles did not provide for compulsory institutional cooperation. His delegation, concurring that the general obligations of cooperation and consultation did not entail a right of veto on planned activities by the potentially affected State, found the provisions proposed by the Commission realistic and well balanced, although they could be further refined. Failure by the State of origin to abide by the obligations in question would, however, amount to a breach of the due diligence obligation of prevention.

77. It would be essential for States to cooperate on the consequences of harm that had occurred despite the taking of all appropriate measures. The latter phrase should not, however, be taken to imply that any harm was negotiable. Areas outside national jurisdiction also fell within the scope of the draft articles. In the *Gabcikovo-Nagymaros* ruling, the International Court of Justice had upheld the argument that general rules and standards of environmental law constrained the wide contractual freedom of the States most directly concerned with the risk of serious transboundary harm.

78. Although, as he had said, the Commission should not consider its task complete until it had dealt with liability proper, the draft articles would, when appropriately refined, represent a significant achievement in the field of risk management. His delegation would therefore be willing to consider the adoption of a separate instrument on prevention, on the understanding that it would form the basis for the continuation of the Commission's work on the topic.

79. **Mr. Pérez Giralda** (Spain) had only one comment to make on Part One of the fifth report on reservations to treaties (A/CN.4/508 and Add.1 and 2), which his delegation found highly commendable: the commentary to draft guideline 1.7.1 should, to avoid confusion, contain a reference to the practices of "opting out" and "opting in", which were especially common under European Community law. For example, the Protocol on social policy required Governments to opt out, while that relating to the participation by some States in the third phase of economic and monetary union required them to opt in.

80. In response to the Commission's request in paragraph 26 for any comments by Governments on the draft guidelines concerning formulation of reservations and interpretative declarations, which the Commission had regrettably lacked time to consider, he said that the late formulation of reservations was an extremely delicate issue, involving as it did security and confidence in treaty relations between States. It was therefore no surprise that draft guideline 2.3.1 (Reservations formulated late), which aimed to reflect both article 19 of the Vienna Convention on the Law of Treaties and the undeniable fact that States parties to an international treaty could adjust their obligations they liked, so long as they did so by agreement, had been difficult to formulate. Nonetheless, the use of a double negative did not bring the necessary transparency to the clearly exceptional nature that late reservations ought to have.

81. Indeed, one half of the guidelines seemed to contradict the other. If a State might not "formulate a reservation to a treaty after expressing its consent to be bound by the treaty", the only exception should be a late reservation by a State once it had obtained the unanimous consent of the other parties to the treaty, and not before. The late reservation would therefore become an amendment to the treaty. In practice, however, as the Special Rapporteur's report recognized, late reservations were made without prior agreement and could be explicitly or tacitly accepted by the other parties to the treaty. Such exceptions, although they existed, should not be formally recognized in a guideline. In view of the importance of emphasizing the exceptional nature of a late reservation, therefore, his delegation agreed with the Special Rapporteur that such late reservations made after the expression of consent to be bound could stand only if the agreement of all the States parties was obtained. Otherwise, a single State, even in its bilateral relations with others which did not object to its reservation, could, arbitrarily and at any moment, make changes to obligations that it had assumed.

82. Paragraph 320 *ff.* of the fifth report on reservations to treaties discussed a recent change announced by the Secretary-General in the time limit for objecting to treaties, from 90 days to 12 months. The change, which his delegation supported, had come about in the context of a broader discussion on the effects not only of late reservations but of amendments to reservations, which the Special Rapporteur would presumably deal with at some future point. In that regard, his delegation considered that, by contrast with the situation relating to late reservations, which always involved the exclusion or modification of obligations assumed by the State formulating them, the

modification of a reservation could involve either the addition of new restrictions or partial withdrawal or a toning down of some of the restrictions initially contained in the reservation. In the first case, there was no difficulty in accepting the unanimity principle, as in the case of late reservations. Changes of the second kind, however, which added to a State's obligations, should not be governed by the same principle. Objections to such reservations should affect only the State formulating them and a State objecting to them. The others could thus continue their treaty relations with the former in a way which more fully observed the purposes of the treaty. Otherwise, as often happened in practice, full compliance with a treaty could be damaged by an objection by a single State party.

83. Lastly, it made little sense for the title of draft guideline 1.5.1 to contain the word "reservations", albeit in quotation marks, when it was clear from the guideline itself that such a unilateral statement did not constitute a reservation.

84. With regard to the draft articles on prevention of transboundary damage from hazardous activities, his delegation considered that the Commission had generally adopted the right approach. Codifying the content and scope of the duty of prevention, however, gave rise to problems as complex as those relating to international liability for injurious consequences arising out of acts not prohibited by international law, the codification of which had been postponed. It was therefore necessary to bear in mind the necessary links between the two issues, in the awareness that decisions taken on prevention would have a bearing on the treatment of the issue of liability.

85. The Commission had been right to extend the concept of "harm" to the environment, as expressed in draft article 2 (b), but it was regrettable that the definition of "transboundary harm" was still restricted, inasmuch as draft article 2 (d) specified "the State in the territory or otherwise under the jurisdiction or control of which ...". That would clearly exclude any environmental harm caused in areas situated away from the national jurisdiction — so-called "global commons" — even though including such areas in transboundary harm had been generally recognized in its national law and practice. Principle 21 of the Stockholm Declaration of 1972 — and subsequently the World Charter for Nature and the Rio Declaration on Environment and Development — clearly stated that States were obliged to avoid harm to areas outside their national jurisdiction.

86. Moreover, numerous international agreements to protect the environment as a whole, without distinction of national territories, were aimed at protecting the sea, space or Antarctica. Of particular relevance were the United Nations Convention on the Law of the Sea and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The International Court of Justice had also given a broader meaning to the principle when ruling on the lawfulness of the threat or use of nuclear weapons.

87. His delegation therefore concurred with others that the draft articles should be given a broader scope; draft article 18 was not sufficient to allay its concerns. The regulation of liability should consider the special situation of environmental harm caused far away from a national jurisdiction. Indeed the draft articles should not only incorporate the achievements of environmental law but should consider the possibility of marrying them with the Commission's proposals regarding State responsibility, the draft articles of which provided for a greater degree of liability for serious violations of obligations to the international community as a whole.

88. **Mr. Lavalle-Valdés** (Guatemala), referring to the draft guidelines on reservations to treaties, said that guideline 1.4.7 dealt with cases in which a State was required to choose between two or more provisions of a treaty, but did not refer to cases in which a State simply had the option of making such a choice. A case in point was the United Nations Convention on the Law of the Sea, which allowed States to choose among different modalities of dispute settlement, stipulating that if such a choice was not made, binding arbitration would apply. He therefore proposed that the phrase "or permits them to make such a choice" should be inserted in the third line of the guideline, after "provisions of the treaty,".

89. Turning to the draft preamble and revised draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he drew attention to the phrase "activities not prohibited by international law" in article 1. That was a key phrase, since it ruled out unlawful activities even if they were accompanied by preventive measures intended to minimize risk or actual harm. He suggested, however, that "activities" should be replaced by "any activity", in order to take into account the comments made by the United Kingdom in document A/CN.4/509.

90. With regard to draft article 2 (a), it was surprising that the word "significant" appeared both in the term to be defined and in its definition.

91. The idea expressed by the Commission in paragraph (12) of its commentary on draft article 3, namely, that States should be required to keep abreast of technological changes and scientific developments, should be incorporated into the draft article.

92. With regard to draft article 8, his delegation supported the United Kingdom proposal to expand it and the proposal by the Netherlands to insert the word "prior" before "authorization" (A/CN.4/509). In draft article 10, the question of whether or not the activity in question could be authorized prior to the conclusion of consultations should be clarified, as paragraph 2 bis implied that it could be, while paragraph 3 implied the opposite.

93. In the last line of draft article 14, the phrase "as much information as can be provided under the circumstances" should be replaced by "all data and information to the extent that circumstances permit".

94. With regard to draft article 15, his delegation supported the amendments proposed by the Netherlands in document A/CN.4/509. His delegation also proposed that the words "or have suffered such harm" should be inserted after "significant transboundary harm".

95. In draft article 16, the word "other" should be deleted. His delegation also proposed that consideration should be given to incorporating into the article paragraphs based on article 28, paragraphs 2, 3 and 4, of the Convention on the Law of the Non-Navigational Uses of International Watercourses.

96. With regard to draft article 19, it was important that the fact-finding commission referred to in paragraph 2 should also have conciliation powers, since there could be disputes other than those relating to the facts. Provisions concerning the composition of the commission should also be added to the draft article, based on article 33, paragraphs 5 to 9, of the Convention on the Law of the Non-Navigational Uses of International Watercourses.

97. Lastly, his delegation expressed its preference for a convention that would cover both the liability and the prevention aspects of the issue.

98. **Mr. Choung** Il Chee (Republic of Korea), referring to the draft guidelines on reservations to treaties, drew attention to guideline 1.3.3, which provided that a unilateral act "shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole". His understanding of the phrase that followed the word "except" was that when a unilateral statement was made with the intent to exclude or modify certain provisions of the treaty or the treaty as a whole, such a statement was not a mere interpretative declaration, but a reservation or conditional interpretative declaration having the same legal effect as a reservation.

99. When a treaty prohibited reservations to itself, States could still make a conditional interpretative declaration to the treaty, having the same legal effect as a reservation. In 1988 the European Court of Human Rights had ruled invalid an interpretative declaration made by Switzerland because it had conflicted with article 64 of the European Convention on Human Rights, which prohibited reservations. His delegation proposed that a statement along the following lines should be added to the draft guideline: "Conditional interpretative declarations to a treaty are invalid when a treaty prohibits reservations to itself". An arbitral tribunal or a court of law could eventually decide whether a unilateral statement amounted to a conditional interpretative declaration and a reservation, or remained merely an interpretative declaration.

100. Turning to the draft preamble and revised draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he said that, while it had been suggested that the fifth preambular paragraph should be placed in the main body of the convention as an independent article, it should be kept in mind that, for the purposes of interpretation, a preambular clause had the same legal effect as the operative paragraphs of a treaty.

101. Draft article 2 (a) referred to two types of harm, "significant" and "disastrous". He would appreciate clarification as to whether those were two different types of harm or two different levels of the same type of harm.

102. Likewise, it was unclear whether the proposed monitoring mechanism in draft article 5 should be

developed on an individual or a multilateral basis; his delegation preferred the latter solution.

103. Since undertaking an environmental impact assessment was one of the most difficult components of the prevention of transboundary harm, he suggested that a set of time-frames should be added to draft article 7 to ensure the speedy implementation of a monitoring policy to prevent the risk of transboundary harm.

104. Lastly, he believed that the use of the phrase "acts not prohibited by international law" in the title of chapter VIII of the report was unfortunate. If any act of a State constituted a risk of causing damage to neighbouring States, such a risk should not be taken, in accordance with the 1996 advisory opinion of the International Court of Justice on the legality of the use by a State of nuclear weapons in armed conflict. The risk of transboundary atmospheric pollution was particularly serious. Since it was very difficult to prevent the movement of polluted air across State boundaries, such pollution must be controlled in its State of origin.

105. **Mr. Roth** (Sweden), speaking on behalf of the Nordic countries and referring to the topic of reservations to treaties, noted with regret that the Commission had been unable to give much consideration to the topic at its fifty-second session owing to time constraints.

106. What was new in the Special Rapporteur's fifth report on the topic was the analysis of alternatives to reservations and interpretative declarations and of the formulation, modulation and withdrawal of reservations and interpretative declarations.

107. The part of the report dealing with alternatives to reservations was intended to supplement the chapter on definitions. The Nordic countries supported the idea of mentioning such alternatives in the draft Guide to Practice. In that connection, the Nordic countries endorsed the Special Rapporteur's view that there was nothing wrong in reflecting State practice. Reservations and their alternatives were useful, as they might increase the number of States willing to become parties to a treaty. The main concern of the delegations on whose behalf he spoke was that States made reservations which were obviously incompatible with the object and purpose of the treaty or which left other States in doubt as to their scope.

108. The Nordic countries welcomed the treatment in the fifth report of the question of so-called late reservations. Late and modified reservations were not uncommon and sometimes posed problems for States. In principle, there were strict rules. Once the moment for making reservations had passed, it was not possible for a State to make a reservation or modify its reservation at a later stage. That principle might, however, be overridden by the unanimous or tacit consent of the other parties to a treaty.

109. In that connection, he noted that the Secretary-General had recently abandoned the practice of giving parties to a treaty a 90-day period in which to object to a modified reservation that had the character of a new reservation, as well as to reservations formulated after a State had established its consent to be bound by a treaty. The time limit had been extended to 12 months.

110. As noted in the report, the Special Rapporteur had dealt up to then with definitions and strictly procedural aspects of the formulation of reservations and interpretative declarations, and not with the consequences of an incorrect procedure. The Nordic countries hoped that the Special Rapporteur would soon proceed to that part of the topic, and they looked forward to his analysis concerning inadmissible reservations and objections to such reservations.

The meeting rose at 1.03 p.m.

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Summary record of the 22nd meeting
Held at Headquarters, New York, on Wednesday, 1 November 2000, at 3 p.m.

Chairman: Mr. Ekedede (Vice-Chairman) .... (Nigeria)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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In the absence of the Chairman, Mr. Ekedede, Vice-Chairman (Nigeria) took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10 and Corr.1 and 2)

1. **Mr. Marschik** (Austria), referring to chapter VII of the report of the International Law Commission (A/55/10 and Corr.1 and 2) dealing with reservations to treaties, said that the elaborate report of the Special Rapporteur had provided a very useful discussion on alternatives to reservations and interpretative declarations, as well as the formulation, modification and withdrawal of reservations and interpretative declarations. Those issues had not been dealt with in great detail thus far, although they were of great practical importance, given the wide diversity of methods by which States could deviate from the full extent of treaty obligations. Nevertheless, the Commission had not dealt with the most urgent question, namely the legal effects of inadmissible reservations, or the question of whether reservations could be made vis-à-vis only some of the States parties to a convention or for a limited period of time. He hoped the Commission would provide an answer to those questions as soon as possible.

2. Turning to the guidelines themselves, he noted that the Special Rapporteur's commentary to draft guideline 1.1.8, "Reservations formulated under exclusionary clauses", placed great emphasis on the practice of the International Labour Organization (ILO). Referring to the Statute of the International Criminal Court, he observed that article 124 allowed a State to declare that it did not accept the jurisdiction of the Court for a period of seven years with respect to certain crimes, whereas article 120 excluded any reservation to the Statute and did not mention the admissibility of declarations under article 124. According to the Special Rapporteur's approach, such declarations would amount to reservations, which ran counter to the argument that article 124 could constitute a lex specialis in the sense of article 120 even though, during the negotiations on the Statute, a reference to reservations explicitly permitted by the Statute had been dropped on the understanding that article 124 did not amount to a reservation clause. As for article 19 (b) of the Vienna Convention on the Law of Treaties, the Special Rapporteur, in paragraph 10 of his commentary, interpreted it as meaning that other reservations were prohibited solely if the treaty explicitly provided that only specified reservations could be made. However, it was doubtful whether that was the meaning intended by the authors of the Convention.

3. Among the draft guidelines not yet discussed in the Commission which touched on the most sensitive areas of reservations, it was not certain that those reflecting the Vienna Convention on the Law of Treaties, on reservations formulated when signing and formal confirmation, and reservations formulated when negotiating, adopting or authenticating the text of a treaty and formal confirmation, (2.2.1 and 2.2.2), needed separate treatment, since it did not facilitate the understanding of the matter. As to draft guideline 2.2.4, "Reservations formulated when signing for which the treaty makes express provision", it raised the general question whether all the guidelines were subject to a lex specialis rule.

4. Considering draft guideline 2.3.1, "Reservations formulated late", from the point of view of the procedure to make such reservations admissible and their effects if the procedure failed, he leaned towards the Special Rapporteur's view that, based on the principle of pacta sunt servanda, such reservations were generally inadmissible unless the treaty provided otherwise. Late reservations endangered the stability of the international legal order and had a negative impact on international relations based on international treaties.

5. As far as procedure was concerned, the question arose whether a late reservation could be admissible if all parties to a treaty explicitly agreed to it, in which case it would have the same effect as a proposal to amend the treaty in the sense of part IV of the Vienna Convention on the Law of Treaties. States Parties wishing to change their own rights and obligations towards other States Parties should use that more flexible procedure, which would have the same result. The proposal of the Special Rapporteur that unanimous tacit agreement should suffice was acceptable only if it was accompanied by a provision stressing the need for adequate information.

6. As to the effects of such declarations in the case of an objection, if the Special Rapporteur's approach, namely that the reserving State remained bound by the

treaty in its entirety, was that which he intended to propose for all inadmissible reservations, then its feasibility could be in doubt.

7. Lastly, he commended the Special Rapporteur's efforts in a complex field where maintaining the integrity of treaties must be reconciled with meeting the divergent demands of States, given the particular nature of normative treaties, in particular those dealing with human rights. The Commission should play a leading role in the codification of that aspect of international law and elaborate general rules before piecemeal solutions appeared, thus avoiding the increasing fragmentation of international law.

8. **Mr. Koskenniemi** (Finland), speaking on behalf of the Nordic countries, said that he wondered whether the criteria adopted by the Commission in establishing its long-term programme of work were consistent with its decision that topics should reflect the needs of States but should also reflect new developments in international law, when the most significant of those new developments were those having to do with non-State actors. The Commission seemed to have chosen to stay with well-worn subjects; out of the five topics suggested, three were left over from the examination of other questions: responsibility of international organizations was related to State responsibility, the effects of armed conflict on treaties to the law of treaties, and shared natural resources of States to the non-navigational uses of international watercourses. Of the three, the topic of responsibility of international organizations seemed to be of the most practical interest, considering their increasingly autonomous role and the growing amount of jurisprudence from national tribunals. On the other hand, the topic of the effect of armed conflict on treaties seemed outdated in an era when "formal" war had virtually disappeared and had been replaced by other forms of conflict which varied from case to case and resisted international codification. Lastly, the topic of shared natural resources, the only one remaining of the four topics suggested in the area of the environment, seemed too restricted in scope if, as suggested in the feasibility study, it was limited to water and confined groundwater sources. Since it was inadvisable to broaden the topic to cover the law of the human environment as a whole, the Commission might consider the precautionary principle, which was of greater general interest, especially as it had already been applied in several conventions and many national laws, but required clearer definition.

9. The Nordic countries wondered why the Commission, if it truly intended to take a forward-looking approach, had not chosen any topic having to do with human rights, economics or development. Perhaps it had wished to avoid duplicating the work of other law-making bodies, or perhaps certain fields, economic development for instance, did not lend themselves to international codification. Although much of development law derived from multilateral and bilateral treaties of assistance and cooperation, and unified codification was not advisable, it would be interesting to identify and develop new principles, for example non-reciprocity or best practices, which were found in such treaties.

10. The fourth suggested topic, expulsion of aliens, was directly related to the major concerns of the twentieth century and had already been included in the Commission's first work programme in 1948 under the topic of the right of asylum. The right of States to expel aliens had never been in doubt, and thus consideration of the item would necessarily focus on cases of mass expulsion, which was already prohibited by the major human rights instruments. Furthermore, collective expulsion usually occurred in connection with major national crises, and thus should probably be dealt with through programmes of assistance geared to the particular aspects of the situation, rather than through regulation by general rules.

11. The fifth topic proposed, the risks ensuing from the fragmentation of international law, was the most interesting. It would be advisable to give it a title formulated in less negative terms, for while a fragmentation of international law linked to the appearance of a host of new actors and the growing number and diversification of existing rules might be fraught with risks, it might equally well afford new opportunities to deal with ostensible conflicts between new and traditional international law, the needs of various groups, the globalization of the economy, the use of new technologies and scientific advances. In fact, the special regimes which worried some people were, for the pluralist societies which had emerged in recent years, a means of adjusting to change and of reconciling (national) diversity with (international) uniformity. Admittedly, they entailed risks, but they were an attempt to find answers to the latest dilemmas while, at the same time, respecting diversity or

polycentricity. To international law specialists, the new legal order might seem hazardous, or even a source of disorder, but the Nordic countries considered it to be more attuned to an increasingly complex international situation.

12. Lastly, he approved of the choice of "Responsibility of international organizations" as a topic for inclusion in the Commission's long-term programme of work. He proposed that the order of "Shared natural resources of States" and "The precautionary principle" should be switched, and recommended that "risks ensuing from the fragmentation of international law" should be retained but should be given a new title, "The effect of the diversification of international law", so that it could be studied with a view to presenting an analysis and possibly recommendations as to how best to take advantage of that phenomenon and, more specifically, to deal with conflicting jurisdictions or treaty regimes.

13. **Mr. Barthélémy** (France) referring to "Reservations to treaties", the subject of chapter VII, said that at previous sessions his delegation had already observed that the French term "*directive*" used to describe the Commission's draft text was unsatisfactory. The expression "*lignes directrices*" was more apt, for the outcome of the work would be a guide designed to assist States, rather than binding rules.

14. The Special Rapporteur had pursued the task of defining concepts and the French delegation welcomed that approach. Many of the issues raised to date originated in vague definitions which required clarification. The distinction between a "reservation" and an "interpretative declaration" was important, but a useful distinction had also been made between reservations and other types of acts which had previously been scarcely or poorly defined.

15. With regard to the draft guidelines provisionally adopted by the Commission on first reading, unless draft guideline 1.2.1 were more precisely worded, there would seem to be no criterion for drawing a definite distinction between an interpretative declaration and a conditional interpretative declaration. Nothing was said about the procedure by which authors of conditional interpretative declarations could make their consent to be bound subject to a specific interpretation of the treaty or some of its provisions. That will had to be explicitly expressed. The fact that an interpretative declaration made on signature, or at some previous time during negotiations, was confirmed when consent to be bound was expressed was not in itself a criterion.

16. Insofar as the current study was focusing on definitions, France considered it important that legal terms should be used with the utmost rigour. In particular, the word "reservation" should be used only for statements matching the precise criteria of the definition in guideline 1.1.

17. Draft guideline 1.5.1, " 'Reservations' to bilateral treaties", plainly did not relate to reservations, for the statements in question did not lead to the modification or exclusion of the legal effect of certain provisions of the treaty, but to a modification of those treaty provisions. The title of the guideline should be amended accordingly. Similarly, if the draft guidelines concerning "bilateralization" agreements made it clear that they did not apply to reservations, the title "Reservations to bilateral treaties" should be avoided.

18. Draft guideline 2.2.1, "Reservations formulated when signing and formal confirmation" did not pose any difficulties for his delegation, since it was consistent with French practice.

19. Draft guidelines 2.3.1, "Reservations formulated late" and 2.3.3, "Objection to reservations formulated late" purported to lay down two complementary rules. The first was that a State could formulate a reservation to a treaty after its expression of consent, if that did not give rise to any objections from the other contracting parties. The second was that one objection alone was sufficient to make the late reservation inadmissible.

20. His delegation noted with interest those two innovatory proposals, which contributed to the progressive development of law and did not therefore constitute mere codification. It welcomed the fact that neither draft guideline was designed to permit frequent or "normal" recourse to late reservations in the future, because on the one hand, just one objection was enough to render the reservation inapplicable to all the States Parties and, on the other, the State raising an objection to the reservation was not obliged to state the reasons therefor, if it did not wish to do so, other than to note that the reservation had been formulated late.

21. It seemed that the draft guidelines did not set out to establish a general derogation from the basic rule commonly accepted by States, namely that reservations had to be made, at the latest, when consent to be bound by a treaty was expressed, as what was at stake was the

security of legal undertakings voluntarily given by States, a security by which France set great store. Apart from the indisputable case when the formulation of reservations after the expression of consent to be bound was explicitly authorized by a treaty, the aim of the draft guidelines was therefore to cope with particular situations, which were not necessarily hypothetical but might be described as exceptional, when a State, acting in good faith, had no alternative other than to denounce the treaty in question, for want of being able to formulate a late reservation.

22. If that restrictive interpretation was in line with the real purpose of the guidelines, his delegation was prepared to consider them in a constructive spirit. It considered, however, that the question should be examined in greater depth by the Commission, so that States could decide on the merits of both draft guidelines with full knowledge of the facts and bearing in mind their possible consequences for current positive law and for State practice.

23. In conclusion, he observed that the ongoing work of definition was especially important and would determine the field of application of the reservations regime. Nevertheless, it was necessary to stress that any new guidelines adopted must complement articles 19 to 23 of the 1969 Vienna Convention and should not fundamentally alter their spirit.

24. **Mr. Verweij** (Netherlands), focusing on unilateral acts of States (chapter VI), on which the Commission had made progress at its fifty-second session, said he wished to draw attention in particular to the issues already covered by his Government in its reply to the Secretariat's questionnaire, although he realized that that reply, like those of other Governments, had been forwarded too late for the Special Rapporteur to be able to take them into account.

25. The Netherlands attached great importance to the codification and progressive development of the rules of international law governing unilateral acts. The area was more limited in scope than treaty law, but its codification and progressive development might promote the stability of international relations. That was why the Netherlands, having sought the advice of the independent Netherlands Advisory Committee on Public International Law Issues, had tried to provide an adequate answer to the Secretariat's questionnaire.

26. His Government, while recognizing the importance of unilateral acts at the international level, believed that the wide variety of such acts made it difficult to identify common legal effects and provide specific answers to the questions posed without differentiating between the various types of unilateral acts such as promise, notification, recognition, waiver and protest. The Netherlands consequently endorsed the view taken by some Commission members, and reflected in chapter VI of the report, that unilateral acts did not lend themselves to general codification and that a step-by-step approach dealing separately with each category of act might be more appropriate.

27. The Netherlands considered that the approach to the scope of the topic adopted by the Special Rapporteur in his earlier reports was unduly restrictive. It therefore welcomed the more liberal approach adopted by the Working Group of the Commission, established in 1999, and by the Commission itself, which had led to a certain widening of the definition of the concept of "unilateral acts". Even so, the Working Group, and subsequently the Commission, had agreed to exclude from the scope of the topic unilateral acts subject to special legal regimes, such as those based on conventional law. A wide range of acts would therefore be excluded from the envisaged regime. The Netherlands would have liked to see the establishment of a 12-mile territorial sea and an exclusive economic zone included among the examples of State practice, but the criteria laid down by the Special Rapporteur had obliged the Working Group and the Commission to abandon those examples.

28. In the same context, it was encouraging to read that the Special Rapporteur had decided not to reintroduce the term "autonomous" which had been used in an earlier draft to qualify unilateral acts, and that the Commission had followed suit. However, it was apparent that there was still disagreement among Commission members as to the relevance of the concept of "autonomy" in the context of defining a "unilateral act", and compromise should be sought.

29. Another aspect of the scope of the concept of "unilateral act" which concerned the Netherlands was the exclusion from the envisaged regime of unilateral acts of international organizations. As the Netherlands had already stated in its reply to the questionnaire, since unilateral acts of international organizations were gaining in significance, it would be advisable for the Commission to address that issue as well, after it had dealt with the unilateral acts of States. There was a clear analogy with the relationship between the 1969

Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Even though unilateral acts of international organizations presented different aspects and problems, there was no reason to delay consideration of them. The Netherlands, which hosted numerous international organizations, attached importance to the topic being placed on the Commission's agenda. As the Commission itself stated, those organizations should be able to enter into unilateral commitments with States and other international organizations, and the issue raised by such acts must therefore be addressed mutatis mutandis in the light of the 1986 Convention.

30. With regard to the definition of unilateral acts, the intention of a State to produce legal effects by means of a unilateral act might not actually suffice to produce the effects sought under international law. In the final analysis, it was international law itself which gave the act its binding force. The Netherlands therefore agreed with those members of the Commission who, on the subject of "autonomy", had noted that a unilateral act could not produce effects unless some form of authorization to do so existed under general international law.

31. The Netherlands noted with satisfaction that the earlier requirement that a unilateral act be formulated "publicly" had been eliminated from the text. In point of fact the public nature of a unilateral statement was not a decisive element vis-à-vis its binding nature. Depending on the circumstances, and in particular whether the statement — or more generally the act — was intended to commit the State erga omnes, as in the *Nuclear Tests* case, or intended exclusively for the addressee State, the statement could be considered as public or confidential respectively. The Netherlands therefore did not share the view expressed in the Commission that there was no justification for eliminating the idea of "public formulation", contrary to what had been said in the Commission, and that what counted, for both practical and theoretical reasons, was publicity of the formulation of the act rather than of its reception.

32. With regard to the question of the analogous application mutatis mutandis of the rules of the Vienna Convention on the Law of Treaties to unilateral acts, it was essential to carry out a full examination of all the ingredients of that Convention (conclusion of treaties, interpretation, application and termination) before it could be determined whether such analogous application was not only possible but also necessary. The Netherlands concurred with the views of some members of the Commission who considered that although the Vienna Convention was a useful frame of reference for an analysis of the rules governing unilateral acts, it should not be reproduced word for word but used very carefully as a source of inspiration. Subject to that caveat, the Netherlands was inclined to believe that at first glance the rules of interpretation and the rules for termination of a unilateral act might be derived from the Vienna Convention and applied by analogy.

33. With regard to persons authorized to formulate unilateral acts — a question which was dealt with in draft article 3 — the Netherlands considered that apart from heads of State, heads of Government and Ministers for Foreign Affairs, all persons who might be deemed authorized by virtue of their tasks and powers to formulate unilateral acts that might be relied upon by third States could be regarded as having the capacity to commit the State. The same concept was conveyed in draft article 3, paragraph 2, although the aspect of reliance by third States upon the unilateral act (in particular a unilateral declaration) was missing.

34. As one member of the Commission had stated, paragraph 2 in its current form was too broad and left the door open for any junior official to formulate a unilateral act that would more than likely be invalidated subsequently. The judgement of the International Court of Justice in the *Gulf of Maine* case seemed to confirm that fear.

35. With regard to article 5, on invalidity of unilateral acts, he approved of the wording of paragraph 6, dealing with the case of a unilateral act in conflict with a peremptory norm of international law. A statement, or a unilateral act in general, could not have the purpose of producing effects incompatible with obligations under general international law, in particular jus cogens. However, a conflict between a unilateral act and a treaty obligation, especially of a contractual nature, need not necessarily lead to invalidity of the unilateral act. His Government considered that it was for the international community to decide whether a treaty obligation must always prevail, or whether one could presume that the legal effects of a unilateral act were not incompatible with

treaty obligations, and that the act would be interpreted accordingly.

36. **Mr. Szénási** (Hungary), referring to the topic of reservations to treaties, noted with satisfaction that the Commission had adopted five important guidelines on the question. Hungary agreed with the approach taken by the Special Rapporteur, according to which international organizations were authorized to make reservations on the same basis as States. That approach reflected the development in international relations whereby international organizations played an increasingly important role in law-making. The five guidelines adopted were acceptable to his delegation in both content and form. It was clear from the commentaries to them that the matter had been the subject of thorough research and analysis. Nevertheless, he wished to make a number of observations regarding the commentary on reservations made under exclusionary clauses.

37. The Commission had devoted almost ten pages to an analysis of the practice of the International Labour Organization (ILO) in that field. According to ILO, the procedural arrangements concerning reservations were entirely inapplicable to it by reason of its tripartite character as an organization in which, according to its Constitution, representatives of employers and workers enjoyed equal status with representatives of Governments. In the opinion of the Special Rapporteur, that reasoning reflected a respectable tradition but was somewhat less than convincing.

38. The system should be flexible enough to be adapted to specific cases, such as that of ILO. There were two other arguments in favour of a degree of flexibility. The first was that there was no shortage of treaties which prohibited reservations, notably the United Nations Convention on the Law of the Sea and the Statute of the International Criminal Court. For the Special Rapporteur, those prohibitions were "more the result of terminological vagueness than of an intentional choice aimed at achieving specific legal effects". Nevertheless, it was a deliberate choice on the part of the authors of the Statute of the International Criminal Court to make a distinction between reservations and certain statements which enabled States to subscribe only to certain parts of the Statute.

39. The second argument was that the very definition of reservations made under exclusionary clauses raised the possibility of "excluding or modifying the legal effect of certain provisions". As far as the opt-in or opt-out clauses were concerned, the second and third guidelines made it clear that restrictions of that type did not fall within the scope of the future guide.

40. His delegation wished to comment on the second part of the Special Rapporteur's report, which, owing to time constraints, the Commission had not considered. It fully agreed with the Special Rapporteur's approach regarding the formal confirmation of a reservation when expressing consent to be bound and therefore approved of the text of draft guideline 2.2.2.

41. Lastly, the issue of late reservations deserved careful consideration, in view of the practice of several depositaries of treaties, including the Secretary-General. His delegation shared the Special Rapporteur's view that the formulation of the relevant draft guidelines would have more to do with the progressive development of international law than with codification.

42. **Ms. Hallum** (New Zealand) stressed the importance that her delegation attached to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, covered in chapter VIII of the Commission's report. A number of considerations underlay that importance. Human activities involving intervention in the natural order would continue to push to the limits of scientific and technical knowledge. While such activities might often produce important benefits, they could also involve harmful consequences, some of which might be unforeseen. The laws of nature made it impossible to confine certain harmful consequences within national boundaries. Lastly, recognized principles of international law, as well as State practice, provided guidance regarding the international framework that should govern such acts.

43. Since the Commission had decided to focus on the prevention articles, her delegation had submitted a comprehensive set of comments on those articles in order to help move the work forward. It remained convinced, however, that prevention and liability were a continuum, ranging from the duty to assess the risk of significant transboundary harm and take preventive action to the obligation to ensure compensation or other relief for harm which had actually occurred. That was why her delegation had continued to advocate the

inclusion of a general article at the beginning explaining the purpose of the articles as a whole.

44. The driving force of the overall topic was the need to reconcile the freedom of States to permit the conduct of useful but risky activities in their territory with their duty not to cause harm in the territory of other States or in areas beyond national jurisdiction. Her delegation considered that the draft articles should take the form of a composite convention, with two objectives: to encourage States to agree, bilaterally and multilaterally, on detailed regimes applicable to the conduct of particular activities; and, in the absence of such a regime, to provide States with a basis for avoiding or settling disputes about the risk or the occurrence of significant transboundary harm caused by their activities.

45. It would be necessary to place some limits on the scope of the topic by providing that it concerned only transboundary harm caused by an activity "through its physical consequences". That term meant those consequences that either directly caused harm — for example, by flooding the territory of a neighbouring State — or indirectly, where the flood resulted in loss of life or damage to property. In some cases, however, the mere risk of harm brought about physical consequences, as where, for example, property values or tourism might be affected in an area at risk of being polluted by emissions from a particular activity, even though no emissions had actually occurred.

46. The draft articles should require the minimization and repair of actual transboundary harm, whether or not it resulted from a foreseeable risk. In relation to prevention, her delegation's view was that, if a State of origin could not prevent altogether a particular kind of significant transboundary harm, its duty was to minimize both the probability and the magnitude of such harm.

47. Lastly, her delegation called on all Member States to continue to support the work on the topic, the importance of which had been emphasized in both the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development.

48. **Mr. El-Shibani** (Libyan Arab Jamahiriya) said that State responsibility was an issue of concern to the international community as a whole. The Commission should focus more on comments by States and the practices evidenced by their replies. It was important to emphasize the need for consensus on certain concepts or definitions appearing in chapter IV, without which the draft articles would lack authority.

49. The Commission's role in the codification of international law was provided for in the Charter of the United Nations, which by no means required that concepts should be introduced for codification prematurely. Thus, for example, his delegation considered that a precise definition was still required for the concepts of State crimes, unilateral coercive acts and countermeasures by the injured State against the responsible State of origin. Such definitions were important, in order to achieve a proper balance of interests between the injured State and the responsible State. Consideration should also be given to incidents of force majeure.

50. His Government was especially worried about the way in which concepts relating to countermeasures had been formulated. The Commission should pay particular attention to that subject and should bear in mind that the case in point involved just one form of the obligation of reparation, a primary obligation under international law. Countermeasures were an exceptional remedy, to be used when faced with absolute necessity and should therefore be ruled out, as long as it was possible to adopt provisional measures protecting the interests of both parties. At all events, any act which entailed the threat or use of force, whether direct or indirect, had to be prohibited, whatever it was called.

51. In that connection, article 49, paragraph 1, deserved close scrutiny because of the consequences it had in international law with regard to bilateral and multilateral relations. As it stood, that article left it to the injured State to decide on the proportionality of the countermeasures it considered necessary in regard to the wrongful act of the other State; it was therefore both judge and judged.

52. In that context, his delegation wished to return to the notion of "collective countermeasures" and to that of "countermeasures by States other than the injured State" which, in its view, still seemed vague and imprecise. It was conceivable that they might give rise to abuses in international practice. That was why the injured State alone ought to be entitled to take countermeasures after it had exhausted all the peaceful remedies offered by international law. Collective countermeasures could be legitimate only in the context of intervention by the competent international

or regional institutions. In that respect, no delegation of power — in other words the handing over of the right to take countermeasures to a group of countries which would exercise that right outside any constitutional framework based on international legitimacy — would be acceptable. Recourse to collective countermeasures must not turn into collective reprisals, in other words action with political aims.

53. The Special Rapporteur had submitted a very interesting report on diplomatic protection, one of the latest topics to be examined by the Commission, in which he had raised several controversial issues. The Commission had rightly concluded that the use of force to protect nationals abroad was a violation of international law, even if the measures adopted came within the purview of article 2.

54. Libya had two objections to make. First, as international practice had shown in fact, several States had interfered in the internal affairs of other countries on many occasions under the cloak of diplomatic protection. Those States had used force to protect their nationals on the pretext of exercising diplomatic protection. Yet their action had violated the sovereignty of the first State, which had been accused of failing to protect foreigners in its territory, and it had often turned into total, downright occupation.

55. Then, on the legal level, the Charter strictly prohibited the use of force when protecting nationals abroad and authorized it only in the event of armed aggression. His delegation therefore saw no justification for linking diplomatic protection and recourse to force. That linkage simply did not exist. That did not mean that his delegation questioned the principle that every State had the duty to use all feasible and advisable peaceful means to protect its nationals abroad.

56. Unilateral acts of States was a topic of particular interest to his delegation which, like the others which had mentioned it, had noted its complexity. State practice and jurisprudence in that area were very poorly developed. Despite the paucity of material, the topic was extremely important and the Commission must pay particular heed to it. But in order to enable the Commission to make more rapid progress, countries should endeavour to explain in greater detail to the Special Rapporteur what their practice was in that respect.

57. His delegation proposed for the Commission's consideration a new category of "expressions of will" reflecting "the intention of producing legal effects" in international relations. They were "unilateral acts attributable to a State", which consisted of the legislation adopted by States whose effect went far beyond their territory or region. It was a well-known fact that the sole purpose of those statutes was to impose political and economic diktats. In recent decades, there had been an increase in domestic legal provisions whose effects extended beyond territorial borders. They were unilateral acts designed to have adverse effects on various levels of international relations by creating additional obstacles to free trade and capital flows. They were indeed violations of international law and internationally recognized principles.

58. The Commission should include that category of unilateral acts in its agenda and consider it very carefully, for it was a subject of great concern to some countries. The resolution which the General Assembly had just adopted on agenda item 31, entitled "Elimination of unilateral extraterritorial coercive economic measures as a means of political and economic compulsion" merely reflected the will of the international community.

59. Lastly, he was quite satisfied with the topics chosen by the Commission for its long-term programme of work, as set forth in chapter IX. He proposed two additional topics: "Nature of sanctions in international law — principles and criteria for the imposition, duration and repercussions thereof" and "Transnational organized crime from the angle of jurisdiction and competence".

The meeting rose at 4.55 p.m.

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Chairman: Mr. Politi .... (Italy)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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The meeting was called to order at 10.15 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Valdivieso** (Colombia), speaking on behalf of the Rio Group and referring to the topic of State responsibility, said that it was necessary to think carefully about the final form to be given to the draft articles. The Rio Group, while mindful of the existing difficulties, would prefer the adoption of a convention as a legal framework that would contribute to resolving disputes which might arise from non-compliance by States with their international obligations.

2. The Rio Group supported the inclusion of draft article 45, relating to the exhaustion of available and effective local remedies before State responsibility was invoked.

3. With regard to Part Two, chapter II, of the draft articles, the Rio Group welcomed the incorporation of the principle of full reparation, which was well established in international law and jurisprudence. With regard to compensation, the Rio Group would favour the inclusion of a method for determining the amount of compensation. As to satisfaction, the Rio Group recognized its symbolic role in facilitating the settlement of disputes, since in many international conflicts non-material damage could acquire great significance.

4. The Rio Group delegations had reservations concerning the provisions on countermeasures. If included in the draft articles, they must be strictly regulated to prevent abuses. Countermeasures should be limited to the suspension of international obligations vis-à-vis the responsible State. They could not involve the use of force or affect established human rights obligations, those of a humanitarian character or those emanating from peremptory norms of general international law. Countermeasures should be proportional, with proportionality being understood as the minimal degree of the measures necessary to induce compliance. The notion of collective countermeasures raised serious difficulties and should be reviewed carefully by the Special Rapporteur.

5. Turning to the topic of diplomatic protection, he said that such protection was a right of the State, exercised at its discretion. The Rio Group rejected the use of force as a means of exercising diplomatic protection. Resort to the threat or use of force was prohibited by Article 2, paragraph 4, of the Charter of the United Nations. The draft articles should clearly prohibit the threat or use of force as a means of exercising diplomatic protection.

6. With regard to the topic of unilateral acts of States, he said that the varied nature of such acts made it difficult to elaborate common rules. Nevertheless, such rules could be established with regard to the definition of unilateral acts, the capacity of States to formulate them, persons authorized to formulate such acts and the causes of invalidity of unilateral acts. Other aspects, such as the legal effects, application, interpretation, duration, suspension, modification and withdrawal of unilateral acts, should be the subject of specific norms.

7. On the topic of reservations to treaties, he said that the treatment given to the topic was linked to a basic component of international law, namely, the law of treaties. The Rio Group supported the approach taken by the Special Rapporteur, which was to fill gaps and clarify ambiguities in the Vienna regime on the law of treaties without impairing its integrity. The Rio Group also supported the Commission's decision to prepare a Guide to Practice, including, where necessary, "model clauses" intended to assist States in concluding agreements or treaties.

8. With regard to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he said that, in view of the need to integrate the prevention and liability aspects of the topic, the Commission should give priority to defining rules on liability.

9. With regard to the suggestion made by some members of the Commission that the distinction between lawful and unlawful activities should be eliminated, the Rio Group believed that the reference in draft article 1 to "activities not prohibited by international law" should be retained, since the draft articles dealt with international liability in the context of risk management.

10. As to the long-term programme of work of the Commission, the Rio Group wished to see the following topics included: responsibility of international organizations, the risk of the fragmentation of international law and the position of the individual in international law. The Rio Group also

supported the holding of one or two of the Commission's sessions in New York.

11. Lastly, the Rio Group delegations expressed concern at the growing tendency to promote the development of "soft law". The Rio Group understood that soft law constituted a transitional step between customary law and treaties and that it made codification possible in many instances. Nevertheless, soft law should not be used as a means of avoiding the adoption of instruments of a binding character. The adoption of declarations or guidelines that were not concretized later in the form of agreements binding on States constituted an unfavourable trend in the codification and progressive development of international law.

12. **Mr. Sepulveda** (Mexico), referring to chapter VIII of the report, said that the set of draft articles was complete and balanced. It gave concrete form to important obligations, such as the duty of States to exercise control over activities conducted in their territory and the duty not to cause damage in the territory of other States. At the same time, certain provisions should be clarified and strengthened, such as those relating to the scope of application and the definition of significant harm. More space should be devoted to the precautionary principle.

13. His delegation attached particular importance to draft article 6 on the authorization of activities carried out in the territory or under the jurisdiction or control of a State; draft article 10, which provided that the State of origin had an obligation to take appropriate and feasible measures to minimize risk; article 11, which listed the factors involved in an equitable balance of interests; and draft article 15, which allowed persons who might be affected by hazardous activities to have access to the judicial procedures of the State concerned without discrimination on the basis of nationality or residence or place where the injury might occur.

14. His delegation was not in favour of modifying the title of the draft articles until a final text had been prepared which analysed both aspects of the topic, namely, prevention and international liability. The report made no mention of the follow-up of the broader issue of international liability, which was what had given rise to the consideration of the issue of prevention in the first place. As noted by the Commission in paragraph 167 of the report on its forty-ninth session (A/52/10), international liability had been the core issue of the topic as originally conceived. Prevention could not be separated from liability; the draft articles on prevention must contain a special regime of liability for damage, whether or not a violation of preventive obligations had occurred. Furthermore, the Sixth Committee had supported the decision to divide the study of the topic on the understanding that once the analysis of prevention had been completed, the study of liability would begin; that understanding had been reiterated in General Assembly resolution 54/111.

15. Turning to the topic of reservations to treaties, he said that the Commission's objective was to assist States to fill gaps and clarify ambiguities in the regime established by the Vienna Conventions of 1969, 1978 and 1986, without modifying that regime or impairing its unity and integrity.

16. The subject of late reservations deserved further consideration. The Vienna Conventions provided that a reservation to a treaty could not be formulated once the State in question had expressed its consent to be bound by the treaty. Draft guideline 2.3.1 took the Vienna regime as its starting-point, but also provided for an exception to those rules based on the consent of the contracting parties. That guideline would open the door to the admissibility of late reservations.

17. While the Special Rapporteur rightly attached value to the consent of the parties to a treaty, his delegation doubted whether that would be sufficient to justify an exception as open-ended as the one contained in draft guideline 2.3.1. In particular, his delegation was concerned at the fact that the draft guideline did not establish any further limitations; that could allow States to modify the scope of international obligations which they had already accepted.

18. His delegation noted with interest the proposal to include in the Guide to Practice provisions on alternatives to reservations and interpretative declarations, which would be of great value to users.

19. With regard to the long-term programme of work of the Commission, his delegation was not convinced of the usefulness of all the topics listed in paragraph 729 of the report, at least in the form in which they were proposed. In particular, it was concerned at the fact that some topics were discussed in isolation, rather than in a more general context, such as the topic of expulsion of aliens, which should not be considered

outside the context of the position of the individual in international law. Furthermore, the inclusion of new topics should not affect the consideration of topics currently on the Commission's agenda.

20. Lastly, his delegation noted with satisfaction the proposal in paragraph 734 of the report to hold one or two of the Commission's sessions in New York; that would help to strengthen ties between the Sixth Committee and the Commission.

21. **Mr. El-Baharna** (Bahrain), speaking on reservations to treaties, noted that according to the commentary to draft guideline 1.1.8, it was a matter of controversy whether statements made in application of exclusionary clauses constituted reservations. That view was based essentially on the practice of the International Labour Organization (ILO), which did not accept for registration instruments of ratification of international labour conventions which were accompanied by reservations. Member States of ILO had to choose between ratifying such conventions without reservations, and not ratifying them at all. However, those conventions did not differ in kind from other treaties containing an express provision excluding reservations. Indeed, some treaties expressly authorized specified types of reservation. Moreover, according to paragraph (9) of the commentary it seemed that a unilateral statement made under an exclusionary clause of that kind could be classified as a reservation, despite the fact that a State party could not object to such a statement, as it could to a reservation. A reservation made under an exclusionary clause was therefore similar to a reservation clause in a treaty. Once a reservation was expressly provided for in a treaty, the contracting States knew what to expect, having accepted in advance, in the treaty, the reservation or reservations concerned. According to paragraph (19) of the commentary, draft guideline 1.1.8, like draft guideline 1.1.2, was based on the expression of consent to be bound by a treaty. His delegation therefore supported the former draft guideline.

22. He was also inclined to endorse draft guideline 1.4.6, on unilateral statements made under an optional clause. The optional clauses in question were those which expressly authorized the parties to accept an obligation not otherwise imposed by the treaty. A unilateral statement under such an optional clause was outside the scope of the draft Guide to Practice. Moreover, a restriction or condition contained in such a statement did not constitute a reservation within the meaning of the draft Guide. Paragraph (2) of the commentary explained that such statements had the effect of increasing the declarant's obligations beyond what was normally expected of the parties under the treaty, and did not affect its entry into force in their case. A statement made under draft guideline 1.4.6 seemed to have the same effect as under guideline 1.4.1, adopted by the Commission in 1999. However, paragraph (7) of the commentary explained that under guideline 1.4.1, the statement was formulated on the sole initiative of the author, whereas a statement under draft guideline 1.4.6 would be made under a treaty. In the light of the commentary, the key difference between the two types of statement was that one made under an exclusionary clause, according to draft guideline 1.4.6, constituted a reservation, while according to guideline 1.4.1 a statement containing a restriction or condition under an optional clause did not. However, because of the potential for confusion between the two types of statement, he thought it would be useful to include a guideline in the draft Guide to Practice in order to distinguish between them.

23. Draft guideline 1.4.7, on unilateral statements providing for a choice between the provisions of a treaty, referred to the kind of clause in a treaty which expressly required the parties to choose between two or more of its provisions. Such clauses were covered in article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions. In that case, a State's consent to be bound by the treaty became effective only when it was made clear to which of the provisions the consent related. The provisions of the draft guideline evidently lay outside the scope of reservations, and his delegation was therefore inclined to support it.

24. With regard to draft guideline 1.7, on alternatives to reservations, he agreed with the view expressed in paragraph (2) of the commentary that such alternatives differed profoundly from reservations in that they constituted not unilateral statements, but clauses in the treaty itself, and accordingly related more to the process of drafting a treaty than to its application. They therefore lay outside the scope of the draft Guide to Practice. The Commission, however, felt that they deserved to be mentioned in the chapter of the draft Guide devoted to the definition of reservations, if only so as to identify more clearly the key elements of the concept. According to paragraph (3) of the commentary, the same problem arose, *mutatis*

mutandis, with regard to interpretative declarations whose objective could be achieved by other means. Draft guideline 1.7.2 stated that alternatives to interpretative declarations were the inclusion in the treaty of provisions in purporting to interpret it, or the conclusion of a supplementary agreement to the same end. He doubted whether it was necessary to go to such lengths in providing for alternative procedures, since the Guide to Practice was intended to deal only with the definition of reservations. His delegation did not believe it would be useful or helpful to expand the topic to include clauses or guidelines on issues related to alternatives to reservations. Such treaty clauses might or might not be regarded as reservations by the States making them. Alternatives to reservations should therefore be regarded as outside the confines of the topic.

25. **Mr. Verweij** (Netherlands) said that his country had been following with great interest, and with some concern developments concerning the topic of international liability for injurious consequences arising out of acts not prohibited by international law. He noted that the only countries, apart from the Netherlands, which had submitted comments and observations on the draft articles by 12 April 2000 were France, Lebanon, Turkey and the United Kingdom. He urged other States to submit their comments, in order to enable the Commission to complete its work on the prevention of transboundary damage from hazardous activities and proceed with work on the draft articles on liability, an essential element of the topic which had been deferred pending adoption of the draft articles on prevention.

26. He noted with satisfaction that the latter draft articles had been changed to reflect the concern expressed about their scope, and especially the definition of "risk of causing significant transboundary harm". The new wording made it clear that a range of activities was covered by the definition. He welcomed the redrafting of paragraph 2 of the former draft article 10, now draft article 9. According to his Government's understanding, that paragraph implied that an environmental impact assessment must be carried out before the State of origin authorized the activity in question, and that information must be given to the public before it was authorized. He welcomed the inclusion of the new draft articles 16 and 17, on emergency preparedness and notification of an emergency, which had proved to be indispensable in ensuring a timely and adequate response to harm caused by hazardous activities.

27. His country regretted, however, that most of its comments and observations, reflected in the report of the Secretary-General (A/CN.4./509) had not been followed. The report of the Commission and the third report of the Special Rapporteur (A/CN.4/510) did not explain why. He drew attention to the comments about the drafting of provisions on environmental impact assessment. Although the draft articles were intended to apply worldwide, and regional conventions might not be entirely suitable for that purpose, more use could have been made of conventions developed in the region of the Economic Commission for Europe, such as the *1991 Convention on Environmental Impact Assessment in a Transboundary Context*. The provision for public participation could usefully have been drawn from the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

28. Lastly, he noted that the treatment of dispute settlement remained meagre. Existing multilateral environmental agreements provided a sound basis for the development of a stronger, effective dispute settlement procedure, and especially for drafting provisions on fact-finding and conciliation. He therefore urged the Commission to pursue its work on the draft articles in the light of the comments and observations submitted by Governments.

29. **Mr. Geete** (India), speaking on the topic of reservations to treaties, said he endorsed the principles embodied in draft guidelines 1.1.8 and 1.4.6. A statement by a State Party that modified the terms of operation of an optional clause might be regarded as a reservation to the legal regime incorporated therein and should therefore fall within the scope of the draft guidelines. However, a unilateral statement embodying a choice between two or more provisions of a treaty in accordance with a provision of that instrument which expressly authorized such a choice did not constitute a reservation; draft guideline 1.4.7 was therefore acceptable.

30. He welcomed draft guideline 1.7.1 and agreed that supplementary agreements between States parties that modified or restricted the provisions of the original treaty should be treated not as reservations but as independent agreements.

31. With respect to draft guideline 1.7.2, he noted that while the insertion in a treaty of provisions purporting to interpret it was the more common practice, the conclusion of a supplementary agreement to the same end was expressly envisaged in article 31, paragraph 3 (a), of the 1969 Vienna Convention on the Law of Treaties and the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations.

32. He was pleased that the Commission's work on the issue of international liability for injurious consequences arising out of acts not prohibited by international law was proceeding on schedule and stressed the need to consider the topic in the context of development issues; funding and transfer of resources to less-developed countries, including enhanced access to suitable technology at a fair price, was essential to the success of standard-building and implementation efforts. While welcoming the inclusion of a preamble mentioning the right to development, he would have preferred one or more articles on the linkage between capacity-building and effective implementation of the duty of due diligence to be included in the draft.

33. He did not think that mention in draft article 11 of the factors involved in an equitable balance of interests would dilute the obligation of prevention established in draft article 3. That issue had already been raised in draft article 10, paragraph 2; moreover, States' efforts to ensure that the measures undertaken by the State of origin were mutually satisfactory and proportional to the requirement of safe management of the risk involved were dealt with in draft articles 9, 10, 11 and 12.

34. While he agreed that deletion of the words "activities not prohibited by international law" in draft article 1 would not materially affect the regime of prevention, which was oriented towards risk management rather than questions of liability and responsibility, he would prefer to retain it and, if necessary, to add a suitable explanation. Furthermore, he was opposed to removing the topic of liability from the Commission's agenda.

35. Although the regime of prevention incorporated the duty of due diligence, he did not think that specific mention of that duty should be included in article 3. The articles should be adopted as a framework convention, and the elaboration of a dispute settlement mechanism should therefore be left to the States concerned.

36. **Mr. Leanza** (Italy), speaking on the topic of reservations to treaties, said that the 12-month time limit for objections to late reservations, recently adopted by the Secretary-General in his capacity as depositary, was preferable to the former 90-day limit. In any case, tacit agreement on late reservations would constitute a new agreement since the time limits for formulation of reservations could not be altered without compromising the principle of *pacta sunt servanda.*

37. Draft guidelines 1.1.8 and 1.4.6 dealt with opting-out clauses inserted in a treaty at the negotiation stage, which were virtually indistinguishable, except in name, from the saving clauses that had long been accepted in international law. They had been included in the draft primarily in order to resolve doubts that could be raised by the practice of certain international organizations such as ILO, whose interpretation of reservations was far more restrictive than that of the 1969 Vienna Convention.

38. The purpose of the restrictive interpretation adopted by those international organizations was to justify the inclusion of statements that limited obligations explicitly authorized under a treaty. However, the same result could be achieved by recognizing that the international legal system had progressed to a point where it could no longer accept the inclusion of reservations other than those explicitly provided for in the treaty. The draft Guide to Practice should therefore include a coherent treatment of exclusionary clauses.

39. Unilateral statements made under an optional clause (draft guideline 1.4.6) differed from those covered by draft guideline 1.4.1 in that they involved a choice based on a treaty provision rather than on the sole initiative of a State. They did not constitute reservations because their intent was not to restrict, but rather to expand, the obligations assumed under the treaty. However, the stipulation that a restriction or condition contained in such a statement did not constitute a reservation within the meaning of the draft Guide, while logically correct, raised several general questions regarding the admissibility of reservations. For example, it might be concluded that the restrictions contained in unilateral statements made under optional clauses were admissible only where they were not

inconsistent with the purpose of the provision in question.

40. The other two guidelines adopted by the Commission at its fifty-second session (guidelines 1.7.1 and 1.7.2) related to alternatives to reservations and interpretative declarations that would still allow States with particular problems or situations to become parties to a treaty. Those guidelines enhanced the understanding of what constituted reservations by clarifying their limits and at the same time encouraged less drastic solutions.

41. Although the new draft guidelines presented by the Commission were helpful for international practice, they represented only a part of a regime that would have to be much more extensive, the next step being consideration of the procedural matters raised in the second part of the Special Rapporteur's fifth report (A/CN.4/508/Add. 3 and 4).

42. Of the five topics presented by the Planning Group for inclusion in the long-term programme of work of the Commission, his Government placed the highest priority on the topics of responsibility of international organizations and the effects of armed conflict on treaties. For the first of those topics, the starting principle should be that, in addition to the general rules in force in the field of State responsibility, the international law of responsibility as it applied to international organizations should include other special rules required by the particular features of the subject. To be sure, the scarcity of international practice on the matter would make the work of the Commission more difficult. However, the syllabus developed by Mr. Pellet was thorough and well thought out. Of particular interest were the ideas put forward on combination of responsibilities, a sensitive topic due to the special nature of international organizations and countermeasures.

43. The question of the effect of armed conflict on treaties was an ideal topic for codification and progressive development of international law, since recent State practice was abundant, yet many interpretative uncertainties remained. The appearance of new types of international conflict and military occupation required special legal consideration. The schema relating to the topic outlined by Mr. Brownlie was very interesting, although point 2, "The definition of a treaty for present purposes," raised some questions. Surely there was no need to arrive at a definition of a treaty other than that contained in the 1969 Vienna Convention. The elaboration of new instruments of codification and development should not result in a multiplication of concepts and create legal uncertainties.

44. His delegation felt that before taking up the proposed topic of shared natural resources of States, it would be better to complete the work on international liability for injurious consequences arising out of acts not prohibited by international law. With regard to the proposed topic of expulsion of aliens, since the matter was part of the domain reserved for the State with only a few restrictions in general international law in the area of human rights protection, notably with regard to refugees and their right to asylum, the subject did not seem a suitable one for codification as international law.

45. Lastly, the proposed topic of the risks ensuing from fragmentation of international law, although a timely one, seemed to require a choice of modalities and techniques of codification, rather than the elaboration of a specific legal regime. If the aim was to help States achieve a fuller understanding of the problem in order to avoid excessive compartmentalization with the resulting risk of incompatibility between legal regimes, it might be better to organize a seminar on the theme.

46. **Mr. Szenasi** (Hungary), commenting on the draft articles on international liability for injurious consequences, welcomed the proposal to delete, the words "acts not prohibited by international law" from the title of the draft articles. He endorsed the reasoning of the Special Rapporteur on that point. He also supported the additions to draft article 6, clarifying the obligations of the State of origin concerning prior authorization. The principle of retroactivity covering pre-existing hazardous activities, laid down in paragraph 2 of that article, was necessary in order to create an all-embracing regime. He supported the more stringent procedural rules currently proposed in draft articles 9 and 10 on the requirements for notification, information and consultation. The obligation placed on the State of origin to introduce appropriate interim measures for a reasonable time created the necessary link between the lifespan of such measures and the period of time needed to resolve the dispute at hand. He strongly supported the new draft articles 16 and 17 on the preparation of contingency plans for

emergencies, and the duty to give notice of an emergency.

47. As for the future form of the draft articles, he agreed with the Special Rapporteur and with the Commission that a framework convention would be appropriate. Such a convention should be without prejudice to higher standards laid down in other related bilateral or regional treaties. It might indeed encourage more detailed specific agreements. In June 2000, Hungary had launched a regional environmental initiative to strengthen regional cooperation in environmental protection in Central and Eastern Europe, based on the various factors in the region which exposed it to events resulting in transboundary harm. The initiative called for enhanced international cooperation in environmental protection and for the strengthening of existing organizational structures for prevention and risk assessment and for the prediction, notification and monitoring of transboundary environmental damage. It placed emphasis on tightening up dispute settlement mechanisms, to ensure that no disputes remained unsolved. The timely adoption of a framework convention would give further momentum to the initiative.

48. On the question of future work on the topic, he recalled that both the Stockholm Declaration and the Rio Declaration encouraged States to pursue the further development of international law on liability and compensation for environmental damage caused by activities within their jurisdiction. The same principle should guide the Commission's future work on the topic, in view of the inherent interrelationship between hazardous activities, the duty of prevention and the question of liability. The latter question, and the need to clarify its relationship with State responsibility, had already been mentioned within the Commission. In order to develop effective rules on prevention, there must be a detailed set of rules on liability and the conditions for invoking it. The Commission was making excellent progress towards completion of the draft articles on prevention, at which time it would be able to proceed with the question of international liability.

49. **Mr. Czapliński** (Poland) said that he endorsed the Commission's decision to produce a Guide to Practice on reservations to treaties that would supplement and clarify the Vienna Conventions rather than amend them.

50. The Commission was of the opinion that the definition of reservations in draft guideline 1.1 and, in particular, the term "certain provisions", should be interpreted in the light of subsequent practice in the implementation of the 1969 Vienna Convention. It was clear from that practice that statements concerning certain provisions of a treaty or the treaty as a whole with respect to specific aspects in their application were recognized as reservations. There was, however, an obvious disharmony between the wording used in draft guideline 1.1 on the one hand and draft guidelines 1.1.1, 1.1.3 and 1.3.3 on the other. That discrepancy should be eliminated.

51. He proposed minor drafting changes to draft guideline 1.1.1, the wording of which expanded the literal meaning of the definition of reservations under all three Vienna Conventions and even that of draft guideline 1.1; however, that expansion was in keeping with State practice in implementation of those Conventions. It appeared from the draft guidelines and the commentary that the Commission was oblivious of the problem of reservations to the treaty as a whole — for example, reservations by which a State claimed the right to denounce a treaty despite the absence of a denunciation clause in the instrument itself. That problem should be addressed.

52. The title of draft guideline 1.1.2 ("Instances in which reservations may be formulated") misleadingly suggested that an exhaustive list would follow, particularly as the Commission distinguished between the terms "reservations formulated" and "reservations made". However, the use of the word "include" in the body of the draft guideline appeared to imply that the instances referred to therein were not exclusive. If the intent was to refer only to all instances of final expression of consent to be bound, there was no need for the reference to signature, which preceded ratification or confirmation, but notification of succession should be mentioned. He therefore proposed that the words "and notification of succession under article 20 of the 1978 Vienna Convention on Succession of States in respect of Treaties" should be added at the end of draft guideline 1.1.2.

53. The title of draft guideline 1.1.3 ("Reservations having territorial scope") was misleading; it was not reservations, but treaties, which had such scope. The content of the provision would be better reflected by the title "Reservations relating to the territorial application of the treaty".

54. Draft guideline 1.4.1 seemed to allow for the possibility that a reservation could be made at a time other than those envisaged in draft guideline 1.1. The provision had the laudable goal of allowing the expansion of a treaty's territorial application; however, a reservation of the type envisaged would fall outside the definition of reservations given in the Vienna Conventions and even in the draft Guide itself, since the temporal element of unilateral statements was an essential aspect of reservations, as confirmed by the Commission in paragraph (11) of its commentary to draft guideline 1.1.5, (A/54/10). The issue required further consideration.

55. Draft guideline 1.1.8 should be amended to cover only exclusionary clauses limited to specific single provisions of a treaty.

56. He was not certain that conditional interpretative declarations should fall outside the definition of reservations, and he found the explanation provided in paragraph (11) of the commentary to draft guideline 1.2.1 (A/54/10) puzzling rather than enlightening. The danger was that States would be unable to oppose such declarations through a well-established mechanism of objection, a situation which might open the door to their imposition on other States.

57. He was generally in favour of the Special Rapporteur's approach to the formulation, modification and withdrawal of reservations and interpretative declarations. However, the draft Guide appeared to assume that late reservations required a collateral agreement, whereas his delegation believed that they should be deemed legitimate in the absence of any objection by the other contracting parties consulted by the depositary; a single objection would render the reservation invalid, and the requirement of unanimity would limit the risk of abuse.

58. Turning to the draft articles on unilateral acts of States, he stressed the difficulty of elaborating general guidelines applicable to all such acts. Formulation of specific criteria concerning particular kinds of unilateral acts would inevitably exceed the Commission's mandate; rather, the focus should be on providing an inclusive set of rules and on establishing the interrelationship, or even the parallels, between unilateral acts and treaties as regulated in the 1969 Vienna Convention. The draft articles should deal exclusively with non-dependent unilateral acts.

59. With respect to draft article 3, he considered that the binding force of declarations or notifications made on behalf of a State by persons other than Heads of State or Government and Ministers for Foreign Affairs should be established under the domestic legislation of the State concerned.

60. With regard to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, his delegation endorsed the Commission's decision to defer consideration of the question of international liability as a means of facilitating work on the topic; however, limitation of the draft articles to obligations deriving from prevention would narrow the topic unnecessarily.

61. He realized that the Commission's work was complicated by the fact that the current status of international law governing preventative measures was unclear. While all States agreed that the environment must be protected and that potentially harmful activities must be regulated, environmental standards and national financial capacities varied and it would be difficult to establish a minimum standard of conduct.

62. He agreed with the proposal to delete the words "acts not prohibited by international law" since the negative consequences of illegal acts would be covered by the law on State responsibility; in any case, it was difficult to imagine a situation in which a State would notify another State of its intention to violate international law in order to negotiate with it regarding environmental impact or risk assessment.

63. He welcomed the inclusion of draft articles 9 and 10; although they did not reflect the current state of international customary law, they rightly introduced the duty to negotiate in order to minimize risks. In addition, the relationship between the draft articles and existing international legal instruments in the field of environmental protection should be clearly set out and the possibility of including a more detailed mechanism for dispute settlement should be considered.

64. **Mr. Rogachev** (Russian Federation), commenting on the topic of reservations to treaties, said he could accept the five draft guidelines adopted by the Commission on first reading at its fifty-second session. They had the merit of successfully combining the treatment of the legal character of reservations found in the 1969 and 1986 Vienna Conventions with a survey of practice in applying the relevant provisions of those conventions.

65. In his view, draft guideline 1.7, on alternatives to reservations and interpretative declarations, had less to do with reservations than with the planning of international treaties. It would, however, be useful as part of the Guide to Practice, which was intended to produce a clearer distinction between reservations and other means of altering the scope of treaty obligations. The Special Rapporteur had rightly chosen to separate such procedures into those forming part of the treaty itself, and those outside it. However, the question of the consequences of inadmissible reservations, those contrary to the object and purpose of the treaty, was not at present covered in the Guide. It would be useful for the Commission to make some recommendations to fill that gap.

66. In conclusion, he found the draft Guide to Practice an extremely useful document and hoped for more rapid progress on it in future.

67. **Mr. Aurescu** (Romania) said that diplomatic protection in contemporary international law represented a discretionary right of the State by virtue of which the State was entitled to protect its nationals when they suffered injury as a consequence of a violation of international law. Although clearly not a human right, diplomatic protection might also be viewed as a valuable procedural modality for ensuring the protection of human rights.

68. Accordingly, in the definition of diplomatic protection in draft article 1 the words "action taken by a State", which seemed to be controversial, should be replaced by the words "procedural remedy or modality undertaken in accordance with international law by a State". The same article should mention the aim or purpose of diplomatic protection. Although diplomatic protection was a sovereign prerogative of a State, exercised at the latter's discretion, its goal must be to ensure that the internationally wrongful act ceased and that the injury was repaired.

69. His delegation supported the views expressed in favour of deleting draft article 2, since the use of force should not be considered a means of diplomatic protection and was contrary to its very nature.

70. In view of recent developments in international human rights law and in the light of the purpose of diplomatic protection, his delegation believed that the innovative provisions of draft article 4 had merit and deserved further consideration.

71. With regard to draft article 5, the issue of effective link should be opposable only between two or more States of which an individual was a national. No other State should be entitled to invoke the effective link concept in order to reject the procedural endeavours of a State of nationality to protect its national, provided only that the nationality had been legally granted. Since a State's right to grant nationality was virtually absolute, the main clause of draft article 5 should read "the State of nationality means the State whose nationality the individual sought to be protected has acquired in accordance with its national laws".

72. In the related draft article 6, his delegation preferred the term "dominant nationality" rather than "effective nationality" in situations of dual nationality. The Commission might consider including a second paragraph allowing, exceptionally, a State of nationality to exercise diplomatic protection against a State of which the injured person possessed dominant nationality if that State violated the human rights or fundamental freedoms of that individual or failed to ensure appropriate protection in the case of such violation.

73. His delegation supported the concept of the joint exercise of diplomatic protection by two or more States of nationality as provided for in draft article 7. An appropriate formula should be found to avoid the difficulties that might arise if one of those States were to cease its efforts to exercise diplomatic protection or declare itself satisfied with the reaction of the respondent State, while the other State or States continued to act. A solution might be found with reference to the purpose of diplomatic protection.

74. Although sharing the concern that the extension of diplomatic protection to refugees as proposed in draft article 8 might impose an additional burden on the State of asylum and thus discourage States from granting refugee status, his delegation basically supported the extension of protection to stateless persons. However, there was a need for further clarification regarding the legal compatibility between refugee status and legal residence.

75. With regard to the work on unilateral acts of States, his delegation supported the suggestion of dividing the draft articles into a first part containing general rules applicable to all unilateral acts and a

second part containing specific rules applicable to individual categories of unilateral acts.

76. In the definition in draft article 1, his delegation would suggest that the possible addressees of a unilateral act should be not only States or international organizations but all subjects of international law. In draft article 3, paragraph 1, it would be better to say that heads of State, heads of Government and Ministers for Foreign Affairs were considered "authorized by the State" rather than considered "as representatives of the State" for the purpose of formulating unilateral acts on its behalf. In paragraph 2 of the draft article, it needed to be clarified which State practice was meant, that of the State formulating the act or that of the addressee.

77. With regard to the topic of reservations to treaties, his delegation welcomed the five new draft guidelines adopted on first reading, particularly guideline 1.7.1 on alternatives to reservations, which should prove highly useful in increasing the number of States willing to become parties to a given treaty. Among the proposed guidelines not yet discussed by the Commission, his delegation particularly welcomed draft guideline 2.2.4 on reservations formulated when signing for which the treaty made express provision, which promised to dispel the confusion evident in the practice of many States in that regard.

78. The proposed guidelines on late reservations followed existing practice. His delegation agreed that a late reservation could only be accepted if all other Parties to the treaty unanimously (and tacitly) accepted it and that a single objection should prevent the late reservation from producing its effects. His delegation noted with interest the extension by the Secretary-General, the most important depositary of multilateral treaties, of the 90-day period for objections to late reservations to a 12-month period.

79. His delegation looked forward to the Commission's further work on the question of permissibility of reservations and the consequences of inadmissible reservations.

80. **Mr. Yachi** (Japan), speaking on diplomatic protection, said that his delegation shared the view that draft article 2 should be deleted. The issue of the use of force should not be dealt with in the context of diplomatic protection. His delegation also did not consider it appropriate to incorporate human rights implications into the draft articles on diplomatic protection.

81. His delegation firmly believed that diplomatic protection was a right accorded not to an individual but to a State under international law. A State had full discretion to decide whether or not to claim the right of diplomatic protection on behalf of its nationals. It had no obligation to do so. Japan therefore supported the Commission's decision to delete draft article 4.

82. His delegation considered that draft article 5 should not deal with methods of acquisition of nationality, since nationality was an internal matter of a State. Regarding the related draft article 6 dealing with dual or multiple nationality, his delegation believed that the time was not ripe to codify a rule allowing a State to exercise the right of diplomatic protection against a State of which the injured person was also a national. Current international law did not substantiate the principle of dominant or effective nationality to such an extent.

83. His delegation, like others, could not accept the proposal in draft article 8 that diplomatic protection might be exercised by the State of habitual residence of a stateless person and/or refugee, and understood the concerns, as expressed by the delegation of the United Republic of Tanzania, of States receiving a large influx of refugees. Given the vast numbers of refugees existing in the world, it was obvious that legal arrangements were needed for their protection, but because the political circumstances varied, special arrangements were required in each case. The problem could not be solved by general and residual rules and could be more appropriately addressed by other bodies.

84. His delegation doubted that the topic of unilateral acts of States was ripe for codification given the lack of sufficient State practice. Very few unilateral promises made by States were intended to be legally binding.

85. Although Japan supported the Commission's efforts to produce guidelines on reservations to treaties, his delegation feared that the draft articles as they stood might be too complex to be useful as a guide to State practice. Conceptual distinctions among categories were meaningful only if the legal effects of each category were clarified. His delegation hoped the Commission would take up more concrete issues, such as the inadmissibility of reservations and objections to reservations. It did not feel that the subjects of draft guidelines 1.7.1, alternatives to reservations, and 1.7.2, alternatives to interpretative declarations, should be dealt with under the subject of reservations to treaties.

86. Japan would like to commend the Commission on its steady progress on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. Such international liability could relate to many fields in international law, such as the marine environment, oil pollution, nuclear damage, natural resources, transportation, military activities and space. For some of those areas, a specific regime of liability had already been established. Since each of the various categories required consideration of its special characteristics, it would be difficult to establish a general principle applicable to all fields. Japan therefore strongly supported the Commission's focus on prevention and its decision to defer consideration of international liability. His delegation agreed with the approach of the draft articles in establishing certain procedural requirements, such as prior authorization, notification of and consultation with affected States, the provision of information to the public, and assessments of environmental impacts of activities involving a risk of significant transboundary harm.

87. At the current juncture, it was important to consider the final form the draft articles might take. If the text were to be adopted as a treaty, some States might be discouraged from signing it owing to difficulties in their domestic ratification process. It would therefore be preferable to adopt the draft articles as a guideline or resolution establishing a standard set of procedural requirements. Although the Commission was considering a framework convention as a possible form for the text, his delegation was not clear as to what was envisaged by a framework convention and would ask the Commission to re-examine the question of the final form of the draft articles taking into account the comments of Governments.

88. In considering topics for the long-term programme of work, his delegation hoped that the Commission would keep environmental issues under consideration. Because environmental law was a vast field where progressive development was rapidly taking place, the scope of work should be limited to international environmental law relating to the common heritage of mankind. The method of work should be to compile the common substantive provisions found in multilateral environmental conventions and extract general rules.

The meeting rose at 12.30 p.m.